





REPORTS OF CASES

4/1881

DECIDED IN THE

COURT OF APPEAL,

DURING PARTS OF THE YEARS 1889 AND 1890.



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JUDGES
OF THE
COURT OF APPEAL
DURING THE PERIOD OF THESE REPORTS.

THE HON. JOHN HAWKINS HAGARTY, C. J. O.
“ “ GEORGE WILLIAM BURTON, J. A.
“ “ FEATHERSTON OSLER, J. A.
“ “ JAMES MACLENNAN, J. A.

Attorney-General :
THE HON. OLIVER MOWAT.



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ERRATA.

Page 84, line 8 from bottom, for "the trustee appointed" read "the appointment of the trustee."

Page 384, line 11 from top of page, insert the word "no" between the words "have" and "power."

ONTARIO APPEAL REPORTS.

GIBBONS V. WILSON.

Assignments and preferences—Bills of sale and chattel mortgages—Actual advance—R. S. O. ch. 124, secs. 2, 3—Notice to solicitor.

A solicitor, acting for a creditor, obtained for the debtor on the security of a chattel mortgage a loan from another client who was ignorant of the purpose for which the loan was required. The solicitor, by direction of the debtor, out of the moneys advanced paid off the creditor in full and shortly afterwards the debtor assigned :—

Held, affirming the judgment of the Chancery Division, 17 O. R. 290, that the mortgage was one to secure a present actual *bond fide* advance, and could not be impeached.

Stoddart v. Wilson, 16 O. R. 17, questioned.

The question of notice to the solicitor as affecting the client discussed.

THIS was an appeal by the plaintiff from the judgment Statement. of the Chancery Division, reported 17 O. R. 290.

The action was brought to set aside a chattel mortgage for the sum of \$600, made by one Clarke in favour of the defendant, dated the 7th of February, 1888.

The plaintiff was the sheriff of the county of Huron, to whom Clarke made an assignment for the benefit of his creditors under R. S. O., 1887, ch. 124, on the 8th of March, 1888. Clarke was a merchant carrying on business at Seaforth, in the county of Huron, and becoming embarrassed was pressed by some of his creditors for payment, and threatened with actions. After making a futile attempt to obtain assistance from some friends, he went to Hamilton to see Messrs. John Stuart, Son & Co., his largest creditors, with the view, as he said, of making in their favour a mortgage upon his stock, thinking that such a mortgage would have the effect of protecting the stock for the time being from his other creditors. He explained his position

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to Messrs. John Stuart, Son & Co., who refused to take the mortgage, but asked Clarke to go with them to their solicitors to see what could be done. These solicitors were also solicitors for the defendant, and in the habit of investing money for him. After some discussion, Mr. Scott, the member of the firm of solicitors who was seen, said that he could obtain a loan for Clarke on the security of his stock, and he then prepared the mortgage in question and had it executed by Clarke who signed an order as to the application of the money, and left it with the solicitors. Subsequently the solicitors obtained the money from the defendant, who had personally no knowledge of the circumstances of Clarke, or of the disposition that was to be made of the money advanced, and, as directed by Clarke, paid to John Stuart, Son & Co., \$484, the amount of their overdue claim, and also \$100 for goods purchased from them by Clarke immediately after the making of the mortgage, and retained the balance in payment of the costs.

The action was tried before MACMAHON, J., at Goderich, on the 4th of May, 1888, and he subsequently delivered judgment dismissing the action with costs, finding as a fact that the defendant had advanced the sum of \$600 on the security of the mortgage in good faith, and without any notice or knowledge that Clarke was unable to pay his creditors in full, or that he intended to give John Stuart, Son & Co., a preference over his other creditors. This judgment was affirmed by the Divisional Court, and an appeal by the plaintiff from their judgment came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A.) on the 17th and 18th of October, 1889.

Moss, Q. C., and *Garrow, Q. C.*, for the appellant. The solicitor acted as agent for the mortgagee in the transaction, and the mortgagee was affected with knowledge of everything the solicitor knew. Clearly if the defendant with the knowledge of the facts that the solicitor had, had taken the mortgage it could not be upheld. The solicitor

was really substituted for the defendant, and his knowledge and his act must be treated as the knowledge and the act of the defendant: *Weir v. Bell*, 3 Exch. D. 238; *Rolland v. Hart*, L. R. 6 Ch. 678; *Bradley v. Riches*, 9 Ch. D. 189; *Kettlewell v. Watson*, 21 Ch. D. 685; *Brotherton v. Hatt*, 2 Vern. 574; *Fuller v. Bennett*, 2 Hare 394; *Commercial Bank of Canada v. Cooke*, 9 Gr. 524. The present case is not within the exception grounded upon *Kennedy v. Green*, 3 M. & K. 699, and that class of cases, where there is an honest transaction on foot and the agent's fraud is independent or collateral, or for his own benefit. In the present case, there is no presumption of concealment on the solicitor's part. Then the money advanced never came into the debtor's hands, so that the general creditors could not have obtained any benefit, and the transaction is void on this ground: *Stoddart v. Wilson*, 16 O. R. 17.

W. F. Walker, for the respondent. No case whatever has been made out against the defendant. There is no proof of Clarke's insolvency, and no proof that the solicitor had any knowledge of the state of his affairs. The trial Judge has found the facts in favour of the defendant, and his finding cannot be interfered with. Even if the solicitor had knowledge, still that knowledge cannot be imputed to the defendant. Any inferences that the solicitor ought to have drawn from the facts that he did know are not inferences that bind the client, and even actual knowledge would not affect the client except in so far as it was knowledge of facts, and not knowledge of motives or purposes: *Brown v. Sweet*, 7 A. R. at pp. 738 and 740; *Eyre v. Burmester*, 10 H. L. C. 90. All the cases cited are cases of title to land, and knowledge of defects in title was in question. The solicitor here was not a general agent for the defendant, but was simply acting with special authority, and as soon as the money was paid to the solicitor he ceased to be an agent of the defendant, and became the agent of the borrower to pay over the money as he might direct, which he might lawfully do.

Moss, Q.C., in reply.

Judgment. January 14th, 1890. OSLER, J. A.:—

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[The learned Judge stated the facts and continued :]

The mortgage is attacked on the grounds, (1) that there was no actual loan or advance of money by the defendant to the mortgagor; (2) that even if there was, the mortgage was a scheme on the part of the latter to enable him to continue his business, and by covering his property to set his creditors at defiance, in other words to defeat, delay, or hinder them, and that the defendant had notice through his solicitor of the fraud of the mortgagor; (3) that the intent and effect of the transaction was to give Stuart & Co., creditors of the mortgagor, to whom the proceeds of the loan were paid, and who could not have taken a mortgage directly in order to secure themselves, a preference over the mortgagor's other creditors.

As regards the first objection, it was proved beyond question that the mortgage was taken as security for a present actual *bonâ fide* advance of \$600 by the defendant to the mortgagor, and that so far as he was personally concerned he was innocent and ignorant of any fraud or irregularity, if such existed, in the transaction. The mortgage would therefore come within the saving of the 3rd section of the Act.

The other objections are based upon the assumption that Scott, the solicitor of Stuart & Co., and of Clarke, had notice of the latter's intent in making the mortgage, lent himself to carry it out, and concocted the arrangement by which he was to borrow the money from the defendant, and pay Stuart & Co. the debt which the law forbade him to secure by giving them a mortgage; and it is argued that Scott having been also solicitor for the defendant in making the loan, the mortgage is defeated, because notice of the alleged fraud through his solicitor must be imputed to him, in accordance with the well known doctrine. I do not think the doctrine can be pushed so far as to embrace a case like the present, where, upon the plaintiff's view of the facts, the solicitor must have been employed for the

express purpose of doing an act in contravention of the statute, and of aiding the debtor and Stuart & Co. in perpetrating a fraud upon creditors. On this assumption the transaction was an illegal one, even if the facts had been actually disclosed to the lender, that is to say, the solicitor's fraud did not consist merely in concealing the facts from his client, and the case is on this ground quite distinguishable from those in which the solicitor's fraud is in the concealment of an encumbrance or some defect in the title. Spragge, C. J. O., in *Brown v. Sweet*, 7 A. R. 725, says, (at p. 740,) "In the cases that I have seen on the subject, it has been the necessary effect of what has been done to displace or postpone the position of a prior purchaser or mortgagee. It is clear that it (the doctrine of imputed notice) does not apply to all cases," and he adds his own conclusion "that to carry (it) further than it has been already carried, would lead to mischievous consequences." The tendency of modern decisions is certainly not in that direction. I quote the following passage from the notes to the last edition of White & Tudor's L. C., Vol. ii., p. 70: "The principle laid down in *Kennedy v. Green*, has been held not to apply unless it be made out that a distinct fraud was intended in the very transaction, so as to make it necessary for the solicitor to conceal the facts from his client in order to defraud him. See *Atterbury v. Wallis*, 8 D. M. & G. 454; where a solicitor took a mortgage of an equity of redemption and sub-mortgaged it. Soon afterwards he and the first mortgagee and the mortgagor joined in a new mortgage of part of the property, he acting as the solicitor for all the parties to the transaction and suppressing all mention of the sub-mortgage. It was held that the new mortgagee was affected by the solicitor's knowledge of the sub-mortgage (his conduct not excluding the effect of such notice) and took subject to it. There the sub-mortgage was not of itself a fraud, which it was necessary to conceal from the new mortgagee, who might have been willing to have advanced his money subject thereto, hence it was not sufficient of itself to rebut the ordinary

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presumption of disclosure by the solicitor so as to affect his client with notice." Here, that which was known to the solicitor (on the assumption already made) was the fraudulent intent of Clarke, or of Clarke and Stuart & Co., which was necessary to be concealed from the defendant in order that he might lend his money upon a security which would be utterly worthless if he had notice of it. It may be thought quite as improbable that information of such a fraud would be communicated by the solicitor to the innocent client in a case like the present as in a case where he had been expressly directed by the other client not to communicate a fact, and therefore it would seem quite as unreasonable to impute notice in the one case as it is in the other ; in short, the reason for presuming that the solicitor has discharged his duty in such a case does not exist. The language of Page Wood, V. C., in *Sharpe v. Foy*, L. R. 4 Ch. 35, is appropriate : "It would be an encouragement of fraud to apply the rules of notice, which were established for the safety of mankind, to a transaction like this. It would be sanctioning a scheme to rob a man by colluding with his solicitor." I refer also to *Eyre v. Burmester*, 10 H. L. C. at p. 114 ; *Wyllie v. Pollen*, 32 L. J. Ch., 782 ; *Re Marseilles Extension R. W. Co.*, L. R. 7 Ch. 161 ; *In re Colemere*, L. R. 1 Ch. 128 ; *Hewitt v. Loosemore*, 9 Hare at p. 455 ; *Cave v. Cave*, 15 Ch. D. 639 ; *Driffill v. Goodwin*, 23 Gr. 431 ; *Saffron Walden Society v. Rayner*, 14 Ch. D. 406.

We cannot, at all events, allow this appeal without reversing the trial Judge's findings of fact, that the solicitor who acted for the defendant, and through whom it is sought to affect the defendant with notice of some fraudulent intent on the part of Clarke, had himself no such notice. The evidence is extremely meagre ; neither the solicitor nor any member of the firm of Stuart & Co., was called, and whatever suspicions may be excited by the circumstances, I think the learned Judge was quite justified in holding that the evidence fell short of the clear proof of notice which should be required in order to affect the

defendant and destroy his security for money actually and in good faith advanced by him.

Judgment.

OSLER
J. A.

I have no doubt that we should dismiss the appeal; but there is another aspect of the case which ought not to be overlooked. It must always be remembered that a preference of one creditor to another is not unlawful except so far as the statute makes it so, and that payment of money to a creditor in discharge of his debt, though a preference of the strongest and plainest kind, is expressly excepted from the operation of section 2 of the R. S. O. ch. 124, and further, that section 3 as it originally stood in the Act of 1885, 48 Vic. ch. 26, was amended apparently with the view of making it clear that payment to a creditor was not intended to be affected. See 50 Vic. ch. 19, sec. 2 (O.) Moreover, an insolvent remains at perfect liberty to borrow money upon the security of his property so long as it is a present, actual, *bonâ fide* advance to him.

If payment of a debt is not forbidden by the Act, can it, under any circumstances, be the lender's concern that the borrower intends to pay a debt with the borrowed money? It may be said that this is a mere evasion of the Act, and that the creditor is more effectually preferred than if he had taken a mortgage; but the question is, whether the thing done comes within the prohibition. The Act has been held not to be an insolvent Act; and in principle, therefore, there is no reason for construing it differently from the way in which its predecessor, R. S. O. (1877), ch. 118, was construed, except in so far as its provisions are an extension of the provisions of that Act. I refer to *Macdonald v. Crombie*, 10 A. R. 92, and that class of cases, and *Ramsden v. Lupton*, L. R. 9 Q. B. 17.

I think that the appeal should be dismissed.

HAGARTY, C. J. O., and BURTON, J. A., concurred.

Judgment. MACLENNAN, J. A. :—

MACLENNAN
J.A.

I have hesitated a good deal over this case, finding it difficult to agree with the learned trial Judge that a case was not proved within the statute 13 Eliz., ch. 5, of actual fraudulent intent to hinder and delay creditors on the part of the mortgagor, Clarke, and of notice to the defendant of the fraud. But upon the whole, I do not see my way to differ.

[The learned Judge discussed the evidence, and continued:]

If I had been able to come to the conclusion that the mortgagor had told the solicitor who acted for the mortgagee the fraudulent purpose for which he desired to effect the mortgage, I think it clear that the mortgagee would have been affected by that information, and that he could not have upheld his security.

It was argued that on the principle of *Kennedy v. Green*, 3 M. & K. 699, and the cases which have followed it, the defendant would not be affected by the notice to his solicitor because it cannot be supposed that the solicitor would communicate to his client that the mortgage was made for a fraudulent purpose. In my judgment the class of cases referred to does not at all govern the present. What was there to prevent the solicitor telling his client that the mortgagor wanted to make the mortgage to hinder and delay his creditors? In doing so he would not be disclosing or exposing his own fraud or misconduct. In a case like the present the fraud is that of the mortgagor. It is his intent to hinder and delay his creditors which makes the transaction fraudulent and void, and it is notice of the fraudulent intent which affects the mortgagee. Why should the solicitor in this case not have gone to the client, and have told him about this man's application for a loan, and the purpose for which he wished to effect it, and have laid it before him and have explained it just as fully as it had been made known to himself? There was no reason for his keeping anything back. He had not defrauded any body, or done anything to be ashamed of, or which he would natur-

ally desire to withhold. That being so I am at a loss to perceive on what possible ground it can be contended that the principle of *Kennedy v. Green* should have any application.

Judgment.
MACLENNAN
J.A.

It was, however, argued for the appellant that the mortgage was void as a fraudulent preference, because the mortgage money was applied in greatest part to pay Stuart & Co. in full.

There are two answers to that. In the first place it was not proved that either the defendant or his solicitor had notice or knowledge that the mortgagor was insolvent or was unable to pay his debts in full, and unless he was he could pay his debts in any order he pleased.

But besides that, I am unable to concur in the view that when an embarrassed debtor *bonâ fide* borrows money on mortgage, he may not direct the lender to apply the proceeds of the loan for his benefit in any way in which he himself might lawfully apply it. The statute expressly exempts from illegality, as acts of unlawful preference, payments in money made to a creditor, and the borrower in the present case might have received the money from the lender, and might at once have paid it to Stuart & Co., in satisfaction of their debt. I am unable, with great respect, to see why the borrower could not have requested the lender to make the payment for him, or why, as was decided in *Stoddart v. Wilson*, 16 O. R. 17, the form should require to be gone through of paying the money into the hands of the borrower himself. I think it would be legislation, and not construction, to hold that the statute has forbidden a debtor to employ an agent to do for him what he may lawfully do himself.

For these reasons I am of opinion that the appeal should be dismissed.

Appeal dismissed with costs.

JOHNSON V. HOPE.

Assignments and preferences—Bankruptcy and insolvency—Bills of sale and chattel mortgages—Mortgage to secure moneys paid by mortgagee to creditor—Intent to prefer—Notice of insolvency—R. S. O. ch. 124, sec. 2.

A transaction entered into by a person in insolvent circumstances is not impeachable unless the person claiming the benefit of the transaction had notice or knowledge of the insolvency and did not act in good faith. A security given by a person in insolvent circumstances to secure an actual advance made without notice or knowledge of the insolvency, and in good faith, is not impeachable because the moneys advanced are, pursuant to the direction of the insolvent, paid over to one of his creditors, who thereby obtains a preference.

Stoddart v. Wilson, 16 O. R. 17, disapproved.

Judgment of the County Court of Hastings reversed.

Statement.

THIS was an appeal by the plaintiff from the judgment of the County Court of Hastings.

The action was brought by the plaintiff, a chattel mortgagee, against the defendant, the assignee for the benefit of creditors of the mortgagor, one Hicks, to recover the sum of \$165 and interest upon the sale and conversion by the assignee of the mortgaged goods.

The defence set up was that the mortgage was void, having been made by the mortgagor to secure a pre-existing debt when he was in insolvent circumstances, and unable to pay his debts in full, with intent to defeat his creditors, and to give the plaintiff a preference.

The mortgagor had borrowed from the plaintiff's wife some years before the transaction in question \$200, giving his note therefor, and he had paid the interest on the loan, and also \$50 on account of principal. Shortly before the date of the mortgage, the plaintiff, at his wife's request, went to Hicks, to get the money, and it was proved that the plaintiff was to pay his wife's debt, and the note of the debtor for \$60, then held by the plaintiff's wife. One Bogle was an endorser, and was to take a mortgage for both sums amounting with interest to \$215.

In pursuance of this agreement the mortgage in question was made, the note for \$60 was paid by the plaintiff, the note held by the plaintiff's wife was given up to the debtor,

and shortly afterwards the plaintiff paid the money to his wife.

The mortgage was made on the 3rd of May, and the assignment for creditors on the 8th of the same month.

The action was tried on the 13th of June, 1889, with a jury. The following were the questions submitted to the jury and their answers thereto :

(1) Q. Was Mr. Johnson a creditor of John W. Hicks prior to getting the chattel mortgage? A. No.

(2) Q. Did Hicks agree to give the chattel mortgage to Johnson if Johnson would pay his wife's note and Bogle's note, and was that agreement carried out? A. We believe so.

(3) Q. Did Johnson pay those two notes on the terms of being protected by the security of the chattel mortgage? A. We believe he did.

(4) Q. Was there any fraud or fraudulent intent by the parties in this transaction, or in carrying it out? A. We think no fraudulent intent.

(5) Q. Was the mortgage made with the intent to defeat, delay, or prejudice creditors? A. No.

(6) Q. Was John W. Hicks in insolvent circumstances, or unable to pay his debts in full when he gave the chattel mortgage in question? A. Insolvent.

(7) Q. Did Johnson pay the money over into the hands of Hicks?

(8) Q. Or was it agreed that he should pay his wife? A. Yes.

(9) Q. Did he pay his wife the money, and if so, when? A. Yes.

(10) Q. Did he pay Hicks the \$60, or

(11) Q. Was it paid to Bogle? A. Paid to Bogle.

(12) Did the giving of the chattel mortgage, and the payment to Mrs. Johnson, if made, have the effect of giving her a preference as against Hicks' other creditors? A. Had the effect of giving a preference.

Judgment was delivered on the 28th of June, in favour of the defendant, on the authority of *Stoddart v. Wilson*, 16 O. R. 17, which the learned Judge thought governed the case.

No question was raised as to the \$60 paid on the Bogle note, inasmuch as before the trial the defendant had paid that sum to the plaintiff conceding that he could not resist that part of the demand.

The plaintiff appealed, and the appeal came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A.) on the 29th of November, 1889.

Argument. *Moss, Q. C., and F. E. O'Flynn*, for the appellant. The plaintiff was not a creditor of the mortgagor, and this mortgage is not a preference at all, but a security taken in good faith to secure a present advance. Even if the plaintiff can be considered a creditor the mortgage cannot be impeached. The plaintiff acted in good faith and without knowledge of the insolvency and is protected: *Molsons Bank v. Halter*, 16 A. R. 323; *Gibbons v. Wilson*, 17 O. R. 290. An advance to be protected need not necessarily be made to the borrower himself. Payment to a third person at the borrower's request is good. *Stoddart v. Wilson*, 16 O. R. 17, is wrongly decided.

R. C. Clute, for the respondent.

January 14th, 1890. The judgment of the Court was delivered by

MACLENNAN, J. A. :—

I am of opinion that the appeal must be allowed, and that judgment should be entered for the plaintiff for \$155, and interest thereon from the 3rd of May, 1888.

The ground on which the judgment was rested by the learned Judge was that of preference, and that is the only ground on which it was supported on the argument before us, and it is evident there is no room whatever for any other contention against the plaintiff's claim.

Stoddart v. Wilson, 16 O. R. 17, was a case in which the wife of an embarrassed debtor, knowing the state of her husband's affairs, by agreement with him sold her own freehold property to one of his creditors, in satisfaction of the debt of her husband, upon the understanding that her husband was to give her a chattel mortgage as security for an equivalent sum. The mortgage was given, and the Divisional Court of the Queen's Bench Division held that the mortgage was void, as preferential, and that it was not protected under section 3 of the Act, R. S. O. ch. 124, as being made in consideration of any present actual *bonâ fide*

sale or delivery of goods or other property. The Court in effect held, that to maintain the mortgage, it was essential that either the wife should have conveyed her property direct to her husband, or that she should have obtained the price from the vendee, and have paid it to her husband, so that he might have had the opportunity of paying it to his creditors generally, although it was admitted he could, without impropriety, have at once paid it, the moment it came into his hands, to the same persons who had bought his wife's property, from whom it had come in the first place, in satisfaction of their debt.

Judgment.
MACLENNAN
J.A.

Whatever may be said of the position of the creditors who received the conveyance of the wife's land in payment of their debt, by arrangement with their embarrassed debtor, I am, with great respect, unable to see how it can be said that as between the husband and the wife, it was not a case of a conveyance made in consideration of a present actual *bonâ fide* sale or delivery of goods or other property, there being no question raised of relative value. It is undoubted law that the purchaser of property may require the conveyance to be made to his nominee instead of himself; and the vendor, on receiving the consideration, whatever it may be, whether cash, or mortgage of the same or other estate or property, has no option but to comply with the vendee's direction, and is compellable by law to do so. In like manner, also, the vendor or mortgagor of property may, when the moment comes for paying the purchase money, or advancing the loan, direct and require the money to be paid to another person, and the purchaser or lender must comply. The judgment relied on by the learned Judge and by the respondent, would hold that although the Act expressly permits an embarrassed debtor with unrestricted freedom to sell his property for full value, either for money or goods, and to borrow money on the security of any of his property, yet the purchaser or lender may not obey the directions of the vendor, or borrower, as to the payment of the money, as he might do in transactions with other people, without the peril of losing his

Judgment.
MACLENNAN
J.A.

money, or his security. I think such a construction of the statute would be highly inconvenient and dangerous, and ought not to be adopted, otherwise than as the effect of clear and unmistakeable language used by the Legislature.

As long as an embarrassed debtor is allowed by law to deal with his estate at all by selling and borrowing, and paying, I think, with great deference, that persons dealing with him *bonâ fide*, should not be hampered or restricted to any greater degree than in similar transactions with other people, at all events, not unless the Legislature has distinctly said otherwise.

I am therefore respectfully of opinion that the judgment cannot be supported by the case referred to, and I think, that inasmuch as the plaintiff was not himself a creditor of the debtor, and as he did, actually and *bonâ fide*, pay the notes referred to, in consideration of the mortgage, without any fraud or fraudulent intent, as found by the jury, the mortgage was good and valid, and the judgment should have been for the plaintiff.

The mere fact that the payment had the effect of giving the wife a preference, as found by the jury, in answer to the twelfth question, is in itself not sufficient to avoid the mortgage, because all preferences are not fraudulent or illegal.

The statute expressly permits an embarrassed debtor to prefer any one or more creditors, by payment in money, and that is what was done here. He borrowed from the plaintiff, and as the jury have found, the lender paid the money, at his request, to the creditors, and it is the same as if he had paid them the money himself.

But there is another ground also on which the plaintiff, in my judgment, is entitled to succeed. No question of notice of the embarrassed condition of the debtor was left to the jury. I have gone very carefully over the evidence, and I find, as was contended by Mr. Moss on the argument, that there is not from beginning to end a particle of evidence which could have been submit-

ted to the jury, on which they could properly be asked to find that the plaintiff had, when he obtained his mortgage, any notice or knowledge of the embarrassed state of the mortgagor's affairs, and so there was really nothing which could with propriety have been left to the jury in support of the defence.

The statute, 13 Eliz. ch. 5, sec. 6, saves from its operation, conveyances, &c., made upon good consideration, and *bonâ fide*, to persons not having at the time any notice or knowledge of the fraud or covin. It is remarkable that there is no similar general provision in our statute, R. S. O. ch. 124, saving transactions entered into without notice or knowledge of the intent or other circumstances which make them fraudulent. In one member alone, section 3 (1), the exception is extended to persons who are described as "innocent purchasers or parties," which of course must mean persons without notice or knowledge.

But then the word *bonâ fide* is used throughout, and it would seem to follow that the Legislature did not intend to involve persons having neither knowledge or notice, in the disabling and penal consequences of the acts thereby forbidden. It would paralyse trade and mercantile business altogether, if transactions entered into in all honesty and good faith, and for valuable consideration, with persons apparently solvent and prosperous, were liable to be undone upon its being afterwards discovered and proved that such persons were at the time in embarrassed circumstances or unable to pay their debts in full. Such a construction of the Act would make it a trap and a snare instead of an enactment salutary and beneficial to the mercantile community. It has always been the policy of the law to protect, as far as possible, persons acting bonâ fide, and without notice of fraud or other wrong doing, and so I think a person who deals *bonâ fide* with an embarrassed debtor, and who at the time of the dealing has no knowledge or notice of his embarrassed condition, is safe from all the consequences enacted by the statute. It is hard to imagine how a transaction can be

Judgment.

MACLENNAN
J.A.

Judgment. otherwise than *bonâ fide*, with reference to what is forbidden in this statute, if it has been entered into without knowledge or notice of the embarrassments of the debtor.

MACLENNAN
J. A.

I also think that as our statute is *in pari materiâ* with 13 Eliz. ch. 5, the 6th section of that Act may be held as applicable to the Ontario Act, so as to protect persons not affected with notice, and in that view the point may be regarded as decided by *Burns v. McKay*, 10 O. R. 167, (affirmed in this Court), and the cases there cited by the learned Chancellor.

Appeal allowed with costs.

JOHNSTON V. TOWNSHIP OF NELSON.

*Municipal corporations—Highways—Bridges—Limitation of action—
R. S. O. ch. 184, secs. 530, 531.*

An action to recover damages sustained by reason of the neglect of a municipal corporation to keep in repair the approaches to a bridge, where the bridge and approaches are under the jurisdiction of one municipality only, must be brought within three months after the damages have been sustained.

Section 530 of R. S. O. ch. 84 applies only to cases where one municipality has jurisdiction over a bridge and another has jurisdiction over the adjacent approaches.

Judgment of ARMOUR, C. J., affirmed.

Statement. THIS was an appeal from the judgment of ARMOUR, C. J.

The plaintiff was a farmer residing in the township of Nelson, and brought this action against the township to recover damages for injuries sustained by him on the 25th of March, 1888, when his horses took fright and became unmanageable, and dragged the waggon in which he was over the embankment of an approach to a bridge. The bridge in question and the approaches thereto were wholly within the township of Nelson. There were no railings or other guards along the sides of the approaches. The writ was issued on the 28th of August, 1888, and the defend-

ants contended that the action was barred under section 531 of R. S. O. ch. 184. Statement.

The action came on for trial at Hamilton at the Spring Assizes of 1889, before ARMOUR, C. J., and a jury. The jury found all the facts in favour of the plaintiff, but the action was dismissed with costs on the ground that it was barred.

From this judgment the plaintiff appealed, and the appeal came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.), on the 18th of November, 1889.

Carscallen, for the appellant. The plaintiff's action is not based on the neglect of the defendants to keep the highway or bridge in repair, but on their neglect to keep up and maintain the approaches to the bridge, and comes within section 530 and not section 531 of R. S. O. ch. 184. Section 531 only applies to the case of an action for damages arising from want of repair to a road, street, bridge, or highway, and not where there is a breach of the duty to keep up and maintain the approaches to a bridge. The word "approaches" in section 530 includes all such artificial structures as may be reasonably necessary for the purpose of enabling the public to pass with safety from the road to the bridge, or from the bridge to the road: *Traversy v. Gloucester*, 15 O. R. 214; *Toms v. Whitby*, 37 U. C. R. 100; *Pratt v. Stratford*, 14 O. R. 260; 16 A. R. 5.

Fullerton, and *J. W. Elliott*, for the respondents. Approaches to a bridge are first specifically dealt with by section 18 of 43 Vic. ch. 24. Before that time approaches are not specially mentioned because they were looked upon as part of the bridge itself. Section 18 was passed to settle questions arising between different municipalities; but where one municipality only is concerned, everything remained the same, and the approaches for the purposes of repair are part of the bridge. Here the bridge and the approaches are wholly within one municipality

Argument. and no question arises as to who is liable to maintain them and the limitation clearly applies.

Carscallen, in reply.

January 14th, 1890. BURTON, J. A.:—

It is unnecessary to offer any opinion as to whether the limitation clause would apply to a case where the plaintiff's cause of action and the defendants' liability depended exclusively upon the provisions of section 530 of the Municipal Act, in other words where the liability to keep up the bridges and approaches was imposed upon one municipality, and the liability to keep up the highway, of which the bridges and approaches form a part, upon another; as, for instance, in an action brought against a county municipality having jurisdiction over the bridge and upon whom the duty of erecting and maintaining the approach is now cast, for damages sustained by a party injured by reason of the approach being out of repair.

The consideration of that point might involve the further consideration of whether a civil action would lie against that municipality, or whether the remedy is not confined to an information or indictment. In other words, whether there is any implied liability for injuries sustained by one of the public by reason of neglect to fulfil a statutory duty, no right of action being in terms given.

Section 531 applies only to the keeping in repair highways, &c., which belong to or are vested in and under the jurisdiction of the municipality upon whom the obligation is cast, and gives in terms a civil remedy, and it may be, as suggested by Chief Justice Armour, in *Traversy v. Gloucester*, 15 O. R. 214, that the liability to an individual suffering injuries, is still cast upon that municipality.

No such question arises in the present case. The highway and the bridge of which it forms a part, are both vested in and under the jurisdiction of the township of Nelson, and section 530 therefore has no application, whilst the case is expressly within section 531.

I think, therefore, the judgment was correct, and ought to be affirmed. But I cannot part with the case without expressing my regret at the growing practice of disposing of the issues of fact first. This was eminently a case in which the demurrer should have been first disposed of, and the heavy and unnecessary expense of a trial avoided.

Judgment.

 BURTON
J.A.

OSLER, J. A. :—

It is not necessary in this case to place a construction upon section 530 of the Municipal Act, or to consider what is meant by an "approach" to a bridge which that section enacts is to be kept up by the municipality. The bridge in question is in and part of the township road. It was constructed by and belongs to the defendants and must be maintained and kept in repair by them as part of the road under section 531. Section 530 only applies to cases in which two municipalities may be concerned, one of which is bound to keep the bridge in repair by virtue of its ownership, and also, by force of that section, the approaches to the bridge for 100 feet at each end of it, the remaining part of the approach being kept up and maintained by another municipality.

MACLENNAN, J. A. :—

I also am of opinion that the appeal should be dismissed:

I think the sole purpose of section 530 of the Municipal Act was to provide for cases in which the municipality which has jurisdiction over a bridge is different from the municipality which has jurisdiction over the adjacent approaches, by imposing upon the first the duty of keeping up and maintaining the approaches to the extent of 100 feet at each end of the bridge, as well as the bridge itself. This section was passed for the first time in 1880, 43 Vic. ch. 24, sec. 18; while the duty of keeping roads and bridges in repair has rested upon the municipality, I suppose ever

Judgment. since they were first established ; at all events, section 531
MACLENNAN (1) is word for word the same as section 337 of the C. S.
J. A. U. C. ch. 54.

In my opinion the words " keep and maintain " are equivalent words for " repair," and this action could have been brought if section 530 had never been enacted.

It is admitted that both the bridge and the approaches in the present case are now, and always were, under the jurisdiction of the same municipality, namely, this township council, and so I think the duty of the defendants to repair both the bridge and the approaches, depends on section 531 and not upon section 530. That being so the right of action is subject to the three months' limitation, and it was brought too late.

HAGARTY, C. J. O., concurred.

Appeal dismissed with costs.

IN RE CROFT AND THE TOWN OF PETERBOROUGH.

Intoxicating liquors—Liquor License Act, R. S. O. ch. 194, sec. 42—By-law—Electors.

The electors entitled to vote upon a by-law under the Liquor License Act, R. S. O. ch. 194, sec. 42, to increase the amount payable for license duty, are those entitled to vote at municipal elections.

Judgment of ROSE, J., 17 O. R. 522, affirmed on other grounds.

THIS was an appeal from the judgment of ROSE, J., *Statement.* reported 17 O. R. 522.

The question involved was the validity of a by-law of the town of Peterborough, fixing the fees to be paid for licenses to sell intoxicating liquors in that town, the by-law being attacked on the ground that it had not been submitted to those electors entitled under the provisions of section 42 of the Liquor License Act, R. S. O. ch. 194, to vote thereon. When the by-law was submitted the deputy returning officers were instructed not to accept the votes of any leaseholders whose leases did not extend to at least the period within which the first license fees should be paid, and the votes of several leaseholders were rejected. ROSE, J., held that the electors entitled to vote were those entitled to vote at elections of members of the Legislative Assembly, and quashed the by-law, because admittedly it had not been submitted to these electors.

The corporation appealed and the appeal came on to be heard before this Court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ. A.) on the 21st and 22nd of November, 1889.

Robinson, Q. C., and E. B. Edwards, for the appellants.
Poussette, Q. C., and Aylesworth, for the respondent.

January 14th, 1890. HAGARTY, C. J. O.:—

We think it impossible to support this by-law. The returning officers were directed only to receive the votes of

Judgment. leaseholders whose leases extended to a period of at least a year from the time of voting.

HAGARTY
C.J.O.

This was apparently done in supposed compliance with the spirit, if not the letter, of the Municipal Act, R. S. O. ch. 184, sec. 309.

It is clear, I think, that the clauses as to confining the franchise to freeholders and leaseholders whose term extended "for the period of time within which the debt to be contracted, or the money to be raised by the by-law, is made payable," could not, by any reasonable construction, be applied to a by-law like that before us, which neither creates a debt nor provides any time for its repayment.

The design of that clause was for the protection of the property owners who, by the effect of such a by-law as is there spoken of, were, in substance, mortgaging their estates to the debenture holders. The form of oath required from a leaseholder could not possibly be taken by such leaseholders as this by-law allows—that the lease extends for the period of time within which the debt to be contracted or the money to be raised by the by-law now submitted is made payable.

I am satisfied that this franchise restriction can only apply to by-laws creating debts payable at future dates.

In the Liquor License Act, R. S. O. ch. 194, section 42 reads as follows: "The council of any municipality may by by-law to be passed before the first day of March in any year, require a larger duty to be paid for tavern or shop licenses therein, but not in excess of \$200 in the whole, unless the by-law has been approved by the electors in the manner provided by the Municipal Act, with respect to by-laws which before their final passing require the assent of the electors of the municipality."

I think we are to read this as referring to the "manner provided by the Municipal Act" for submitting a by-law to the assent of the electors, which is elaborately provided for in a great number of sections in the Act, and not to the restricted franchise provided for in the cases of by-laws creating debts. It may be that when this restriction was

first imposed, the only by-laws required to be submitted to the electors were by-laws creating debts.

Judgment.

HAGARTY
C.J.O.

I think it first appears in the Act of 1866, 29 & 30 Vic. ch. 51. Section 196 declares that in case the by-law requires the assent of the electors, certain proceedings are to be taken.

Sub-section 7: "The ratepayers entitled to vote on any by-law for incurring a debt, or raising money which shall not be payable within the then current year" must be rated for an estate of freehold, &c., or of a leasehold, the duration of which shall not be less than the period of time, &c., &c.

There the restriction is expressly confined to a by-law for creating debts, &c.

But in 1873, 36 Vic. ch. 48, sec. 233, uses the general words: "Any person shall be entitled to vote on a by-law requiring assent, &c., who is a freeholder, &c., or leaseholder, &c.," as at present.

R. S. O. (1877), ch. 174, is in same form. So in the Act of 1883, 46 Vic. ch. 18, the same form is used, and also in the revision of 1887. The difference is just this: in the early Acts the restriction clause begins by making it apply to the case of by-laws creating debts; the latter phraseology seems to apply to all by-laws requiring assent.

The change has not been in favour of perspicuity. But I am strongly of opinion that we must not construe the existing law so as to support the appellants' contention, which would involve a most unjust, and as I think, unwarranted construction, excluding a large number of electors whom the Legislature never could have intended to disfranchise, except in the case of a vote for creating a direct burden on property holders.

The appellants did not attempt to apply the municipal provision in its integrity. But, as I suppose, struck by the inapplicability of the restriction, compromised by limiting the right to vote to leaseholders up to a year.

Our opinion is, I presume, desired as to the class of electors who should have been allowed to vote.

Judgment.

HAGARTY
C.J.O.

My brother Rose says: "Upon looking at the various sections of chapter 194, I observe that section 11, sub-section 14, provides that 'No license shall be granted to any applicant for premises not then under license, or shall be transferred to such premises, if a majority of the persons duly qualified to vote as electors in the sub-division at an election for a member to the Legislative Assembly petition against it.' I think that I must read 'electors' in that sub-section and in section 42 as referring to the same class, and full effect can be given to the language of section 42 by confining the application of the clauses of the Municipal Act to 'the manner' of holding the election. And I come to this conclusion the more readily as the subject legislated upon by the Liquor License Act is rather one of morals and police regulation than of finance, and so all residents in the municipality have an interest in the question, whether they be property owners or not."

I find a difficulty in accepting this view. In the interpretation clause it is declared that "polling sub-divisions" shall mean the polling sub-divisions for the last general election for the Legislative Assembly.

Sub-section 7 of section 11 declares it shall be the right and privilege of any ten or more electors of any polling sub-division to object by petition to the granting of any license and sub-section 14 is as quoted above by Rose, J.

Sub-section 10 allows the council to authorize any person to appear on behalf of the ratepayers of the city or town &c., as to the granting of a license.

I do not think we should confine the right to vote on a by-law like this to the parliamentary electors unless the statute requires this either expressly or by necessary implication. I cannot understand why the sub-section cited in the judgment below did expressly so enact as to petitioning against a license.

The section 42 of chapter 194 already cited says "to be approved of by the electors in the manner prescribed by the Municipal Act," and sub-section 3 of this section declares: "Any by-law so approved shall not be varied or

repealed unless the varying or repealing by-law has been in like manner submitted to and approved of by the electors of the municipality."

Judgment.

HAGARTY
C.J.O.

The first clause of R. S. O. ch. 184, sec. 293, as to voting on by-laws, says, "In case a by-law requires the assent of the electors of a municipality, the following proceedings should be taken."

In the interpretation clause of the Municipal Act it is declared: "Electors shall mean the persons entitled for the time being to vote at any municipal election or in respect of any by-law in the municipality, ward, &c., as the case may be."

I come to the conclusion, first, that the restricting clause as to leaseholders can only be applied in the case of by-laws creating debts. Second, that the persons who should have been allowed to vote on this by-law were the electors entitled to vote at any municipal election.

BURTON, J. A.:—

If we were dealing with this as an original statute, and called upon to place a construction upon section 42, I should have come to the same conclusion as the learned Judge below, that the electors referred to in that section were parliamentary and not municipal electors; they are the parties intended under sub-sections 7 and 14 of section 11, and it would be at least reasonable to presume that the same meaning was intended for the same expression in every part of the Act. But the Act to be found in the Revised Statutes is not an original enactment but is a consolidation of various Acts, and there can be no question that at the time of the passing of the original section, to be found in the R. S. O. (1877,) ch. 181, the electors named were the municipal electors, and that the amendments made from time to time, and now to be found in chapter 194 of the revision of 1887, have not in any way interfered with or varied that section.

It may be that the law as it now stands is, as it was not very inaptly described by counsel, a legislative muddle;

Judgment.

BURTON

J.A.

but much of the difficulty disappears if we interpret the word "electors," as here used, in the widest sense, viz., persons entitled, for the time being, to vote at any municipal election. The statute does not say electors entitled to vote in respect of any by-law, but electors generally.

The class of electors, therefore, is defined, and the reference to the machinery provided by the Municipal Act, is required only for the purpose of ascertaining their approval.

That machinery is to be found in clauses from 293 to 306, inclusive. Clauses from 308 to 312, become inapplicable, inasmuch as the description of persons entitled to vote has been already defined.

I expressed an opinion in *Canada Atlantic R. W. Co. v. Cambridge*, 14 A. R. 299, and in another case, that certain provisions of the Municipal Act were inapplicable to by-laws relating to bonuses to railways, and must be regarded as passed for a different object; but my view was not sustained by the other members of the Court. I may say, without disrespect, that I still retain that opinion, and in the present case I think we have a right to reject the clauses I have referred to, as inapplicable, inasmuch as they are manifestly inconsistent, if my view of the meaning of the word "electors" is correct, although the law may require to be amended for the purpose of preventing personation and other frauds at the poll.

This is, as I understand the decision, in accordance with the view taken by the Court in *Canada Atlantic R. W. Co. v. Cambridge*, where it was held that a provision, though found in a group of sections prescribing the proceedings to be taken, was inapplicable to the case then under consideration and should therefore be rejected.

But the conclusion we must arrive at is the same as that of the learned Judge below, though for different reasons. The by-law was not submitted to the electors who were entitled to vote upon it, and is therefore void.

OSLER, and MACLENNAN, JJ.A., concurred.

Appeal dismissed with costs.

MAGEE v. GILMOUR.

*Landlord and Tenant—Expiration of term—Notice to quit—Sub-lease—
Overholding Tenant.*

THIS was an appeal by the defendants from the judgment Statement. of the Queen's Bench Division, reported 17 O. R. 620, and came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 26th and 27th of November, 1889.

McCarthy Q. C., and *W. H. Barry*, for the appellants.

J. H. Macdonald, Q. C., for the respondent.

January 14th, 1890. The Court, agreeing with the judg- Judgment. ment below, dismissed the appeal with costs, holding that the tenancy, though by oral lease void under the Statute of Frauds, was a tenancy for a term certain and not from year to year; that the sub-tenancy came to an end with the tenancy, and that the subsequent proceedings fully set out in the report below, did not operate to create a new term as between the sub-tenants and the plaintiff.

ANDERSON V. FISH.

Sale of goods—Stoppage in transitu—Consignor and consignee—Right of carriers to prolong period of transitus.

Statement. THIS was an appeal by the plaintiff from the judgment of the Queen's Bench Division, reported 16 O. R. 476, and came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 14th of November, 1889.

G. T. Blackstock, for the appellant.

J. B. Clarke, for the respondent.

Judgment. January 14th, 1890. The Court dismissed the appeal with costs, agreeing with and adopting the reasons for judgment of the majority in the Court below.

ROSS V. CROSS & CO.

Negligence—Master and servant—Accident caused by defect in hoist.

The defendants were the owners of a tannery for use in which a hoist had been built for them by a contractor, and one of them was, with the plaintiff, one of the defendants' servants, aiding the contractor in putting the hoist in place and in testing it. Owing to a defect in the mechanism, of which the plaintiff and defendants were ignorant, the hoist fell and the plaintiff was severely injured. Both parties were aware that no safety catches had been put in the hoist. The presence of these might have stopped the fall but their absence had nothing to do with the occurrence of the accident.

Held, that the defendants were not liable.

Judgment of the Queen's Bench Division directing a new trial set aside, and judgment of FALCONBRIDGE, J., at the trial restored.

THIS was an appeal by the defendants from the judgment Statement of the Queen's Bench Division.

The defendants owned a tannery in Barrie in which there was a hoist worked by hand ; they purchased a new hoist to be worked by the steam power in their tannery, and employed a man named Phillips by the day to put up the new hoist, and put it in working order. In doing this he had to take out the old hoist, remove the uprights, and put in new ones, enlarge the hole, put the hoist (which came in sections) together, and put up a counter shaft to communicate the power which came from the line shaft. The defendants employed one Campbell to splice the rope required to be used, and Campbell, by the direction of Phillips, fastened the rope (which was an inch and a half rope) to the cage by passing one end of it through a two inch hole in the top of the cage, and then putting a knot on the rope to prevent its being drawn through the hole. The plaintiff had been in the employment of the defendants for some years, looking after the boiler and engine, and acting as overseer of the tan yard, and when Phillips came to put up the new hoist the defendants ordered the plaintiff to assist Phillips whenever he could spare time. On the day of the accident, about 5 p.m., the defendant Wm. H. Cross went to the engine room where the plaintiff was, told him that the hoist was ready to go up, and that

Statement.

he would like to see it go up that night, and asked the plaintiff if the bolts were ready. The plaintiff said they were not, but that after he had measured some bark he would go in and assist him. Cross then went into the cellar where Phillips was, and after the plaintiff had measured the bark he joined them and got the bolts ready and put on the pulleys, Cross assisting him, and then everything was pronounced ready for a start. The plaintiff and Cross then commenced to run the hoist up and down until they got the rope to work properly on the spool ; then Cross and the plaintiff got in the hoist and went up part of the way and came down again, and then went up again as far as the first floor. Then the book-keeper of the defendants and a young son of Cross got in with the plaintiff and Cross, but the bolts not being sufficiently tight to carry them, the plaintiff got off, and the others went up and came down again to the first floor and got off. Phillips then said to the plaintiff "I have not been on yet ; we will go up and put the clip on the end of the rope." The plaintiff and Phillips accordingly went up, and Phillips allowed the cage to press against a beam at the top of the hoist, and the plaintiff stepped forward and caught the end of the rope and reversed and brought the cage down some three or four feet. The plaintiff then said to Phillips that they might as well put on the clip there, and Phillips reversed again to go back to where they wanted to put on the clip. The cage did not stop, however, till it pressed against the beam again, and the knot on the end of the rope was drawn through the hole at the top of the cage, so that the cage fell to the cellar and the plaintiff was injured.

There were no safety catches on the hoist, nor did the defendants intend to put any on.

The action was tried at the Barrie Assizes in the Spring of 1888, before FALCONBRIDGE, J., and a jury.

The following were the questions submitted to the jury, and their answers thereto :

1st. Was the accident to the plaintiff caused by any defect or defects in the construction of the elevator? Yes.

2nd. If so, what was or were the defect or defects? The *Statement*.
rope not being properly secured through the cage and want of safety catches.

3rd. Did the defendants know of said defect or defects before the accident happened? Did not know of first defect, but did of second.

4th. Did the plaintiff know of such defect or defects before the accident happened? No.

5th. What would be a fair sum to be paid by defendants to plaintiff if they are liable to pay anything? Seven hundred and seventy-five dollars.

Upon the answers to the questions and upon the undisputed facts, the learned Judge directed judgment to be entered for the defendants with full costs of suit.

Subsequently, on motion of the plaintiff, a new trial was ordered on the ground that the jury had not found whether the defendants were guilty of negligence, and whether the injury to the plaintiff resulted from such negligence, and whether the plaintiff was guilty of contributory negligence.

From this judgment the defendants appealed, and the appeal came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.,) on the 27th of November, 1889.

McCarthy, Q. C., and *Pepler*, for the appellants. A new trial should not have been directed as there were no further facts to be found. The jury found that the defendants were ignorant of the defect causing the accident, and therefore there is no common law liability: *Griffiths v. The London and St. Katharine Docks Company*, 12 Q. B. D. 493; 13 Q. B. D. 259. Nor is there any liability under the Factory Act, as that applies only to machinery in actual use, and not to a case like this where the machinery was merely being tested preparatory to its being used. No claim is made under the Employers' Liability Act, and there is no ground at all upon which the claim can be supported.

Argument. *Lount*, Q. C., for the respondent. There being no safety catches on the hoist, it was a dangerous machine to the knowledge of the defendants, and having ordered the plaintiff to assist in the working of that dangerous machine, they must make compensation to him for the injuries sustained by him: *Rudd v. Bell*, 13 O. R. 47; *Clarke v. Holmes*, 7 H. & N. 937.

Pepler, in reply.

January 14th, 1890. The judgment of the Court was delivered by

HAGARTY, C. J. O.:—

On the best consideration I can give to the evidence in this case, I am unable to see either that any actionable wrong has been proved to have been committed by the defendants, or how the plaintiff has supported the allegations in the statement of claim.

[The learned Chief Justice stated the facts as above set out, and continued]:

The Queen's Bench Division, however, considered that the jury had not been asked to find, nor had they found, whether there was negligence on the defendants' part or contributory negligence on that of the plaintiff; and that there must be a new trial, and the plaintiff was allowed to amend his claim as to the want of clips. The defendants appeal.

The accident, undoubtedly, was directly caused by the rope being drawn through the hole, not being secured against any sudden shock.

The jury acquit the defendants of any knowledge of a defect in securing the rope, and all that is found against the defendants is, that they were aware there were not any safety catches on the hoist.

I cannot understand how on this state of facts any inference of actionable negligence can be properly drawn; or, in other words, how we can hold that there was any evidence

thereof. When the jury find as a fact that the defendants did not know of any thing being wrong in the fastening of the rope—the forcing of which through the hole, was the proximate cause of the accident—it may be asked what remains? Merely that they were aware there were no safety catches.

To make them liable, we must hold them responsible for anything and everything which might be found to be faulty in Phillips' work.

There could be no reasonable ground for finding fault with the conduct of the defendants in helping Phillips to put up the hoist and set it in motion. If defects were found in its working, and the defendants with full knowledge of their existence continued the use of it, and their workmen in the performance of their duty were consequently injured, we can understand the possible liability of the master.

This was a country tannery, the hoist was for lifting the goods from one floor to another, and not what is called a passenger hoist.

No evidence was offered on the question whether it is so generally necessary and proper to have these safety clips on such a machine, and for such purposes, as to raise a possible presumption of negligence against any man who would allow such a defective machine to be put into his tannery.

I see nothing here except an ordinary setting up of a new hoist, and getting it into working order.

I think to hold the defendants liable on this evidence would be an extension of responsibility in the law of employer and employed beyond all precedent.

At the trial the learned Judge explained the case very fully to the jury, and the law of negligence bearing on the case was discussed. I cannot find that he was asked to leave any question of negligence specially to the jury beyond Mr. McCarthy's suggestion that he should leave it to them "as to whether the accident had not been caused by the negligence of Phillips." No complaint is made of any misdirection.

Judgment.

HAGARTY
C.J.O.

Judgment. The late case of *Galer v. Rawson*, 6 Times L. R. 17, is
 HAGARTY very clear as to holding parties to the course taken by
 C.J.O. them at the trial.

Appeal allowed with costs.

MANDIA V. MCMAHON.

Damages—Measure of—Contract for supply of labourers.

The defendant, who was a contractor for certain work in this Province, entered into an agreement with the plaintiffs that if they would go to New York, at their own expense, and procure about 200 labourers, he would give them work at \$1.25 a day.

The plaintiffs brought the labourers but the defendant refused to employ them.

The plaintiffs were allowed as damages for the breach of the agreement, \$25 their expenses in going to and returning from New York, and \$700 the amount of advances made by them in paying the fares of certain of the labourers from New York. They were not allowed commission that would have been received by them from the men if employment had been furnished.

Judgment of the Queen's Bench Division affirmed.

Statement. THIS was an appeal by the defendant and a cross-appeal by the plaintiffs from the judgment of the Queen's Bench Division.

The plaintiffs were Italian foremen, residing at Niagara Falls, and the defendant was a contractor for certain work on the Grand Trunk Railway, having his chief place of business at Lancaster. In May, 1888, the plaintiffs, having under their control a large number of Italian labourers, entered into a contract with the defendant to supply him with about two hundred men, he agreeing, as they alleged, to furnish work for these men at \$1.25 a day. The plaintiffs then went to New York and brought to Lancaster one hundred and sixty-five men, the agreement with the men being that each man was to pay to the plaintiffs \$1.00 commission, and to repay any money advances made by the plaintiffs for the purpose of bringing him to the place where work was to be had out of the wages received

on the first pay day. The plaintiffs advanced to certain of the men in part payment of their railway fares and expenses from New York to Lancaster, \$700, and they paid for their own expenses in going to New York and returning therefrom \$25.00. The defendant refused to furnish work for the men when they arrived at Lancaster, and the plaintiffs thereupon brought this action to recover damages. Statement.

The action was tried at the Cornwall Autumn Assizes of 1888, before ROSE, J., and a jury. The jury found the facts to be as alleged by the plaintiffs, and judgment was given in their favour for \$206.25, the amount of one day's pay of the men supplied.

The plaintiffs moved by way of appeal from this judgment, asking that instead of being allowed one day's pay, they should be allowed the amount of their expenses and advances, and \$165 for commission. A cross-motion was made by the defendant to enter judgment for him on the ground that no agreement to furnish work was in fact ever made, or for a new trial on the ground that the damages were excessive. The defendant's motion was dismissed with costs, and the plaintiffs' motion was in part granted, the damages being increased to \$725, the amount of expenses and advances.

An appeal by the defendant and a cross-appeal by the plaintiffs from this judgment came on to be heard before this Court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ. A.) on the 28th of November, 1889.

McCarthy, Q. C., and *Aylesworth*, for the defendant. The plaintiffs are not entitled to any damages. There was no reason why they should have paid the expenses of the men, and there is nothing to show that the defendant had any knowledge or could reasonably have expected that such payments would be made. This was simply a private matter between the plaintiffs and their own labourers, these advances being really loans by the plaintiffs to the men to whom they were made. Then clearly the defendant is not liable to pay the commission. That, if recoverable at all, must be recoverable from the men themselves.

Argument.

H. Symons, for the plaintiffs. The defendant is liable for all the damages that might reasonably be expected to flow from the breach of the contract. He must have known that these expenses and outlays would be incurred, and he made it impossible for the plaintiffs to collect the amount from the men, and he is now liable to make good the loss. The damages should be increased so as to allow the plaintiffs the commission of \$1.00 per man that they would have received if employment had been furnished: *Addison on Contracts*, 8th ed., pp. 457, 1033; *Randall v. Raper*, E. B. & E. 84; *McMahon v. Field*, 7 Q. B. D. 591; *Smith v Green*, 1 C. P. D. 92.

McCarthy, Q. C., in reply.

January 14th, 1890. HAGARTY, C. J. O. :—

I agree with the judgment delivered in the Queen's Bench Division.

I think it a case in which, whatever opinion we may be asked to hold as to the correctness of the verdict on the question of fact, we cannot properly interfere. There was certainly evidence, if believed, to warrant the finding. There are difficulties in adopting either the view of the plaintiffs or of the defendant. It was wholly a disputed question of fact, and clearly within the proper province of the jury to decide.

I think the Queen's Bench took the right view as to the damages. They have allowed to the plaintiffs damages for the loss directly and proximately incurred by them on the defendant's breach of contract.

I do not think the case should be embarrassed by the suggestions that possibly each of the labourers supplied would have a separate action against the defendant, or against the plaintiffs for inducing them to spend their time on a useless errand.

Assuming the contract to have been duly made, the plaintiffs incur the expense of going to and returning from New York, and they pay the passage money of such of the

labourers as could not pay their own fare. The refusal of the defendant to employ as agreed causes this direct damage to the plaintiffs.

Judgment.

HAGARTY
C.J.O.

Nor do I think it pertinent to the question to urge that an employment for one day would satisfy the defendant's contract. We all know that in these days of large undertakings the business of supplying labourers to contractors is very common. It never could be understood or imagined that contractors who agreed to find work for men to be brought 500 miles to them could ever contemplate a merely nominal employment for a day. It is not necessary to discuss any such case until the unlikely event of its arising.

I see no objection to the plaintiffs recovering the natural damage arising on the breach of such a contract. We may suggest a case. A man in Toronto wants a servant or a mechanic specially adapted to particular work, a friend here suggests that he knows of a suitable person in New York, and undertakes to bring him up, and the other agrees to employ him. The friend does bring him up, paying his expenses, which the other agrees to repay him out of his earnings. On bringing him to Toronto there is a refusal to employ. I think the person bringing him up can properly recover his own expenses, loss of time, and whatever he had to pay for the servant. It would be no answer to say that he perhaps could recover the amount from the servant, or that the latter could also sue for not being employed as agreed.

I think that the appeal must be dismissed.

OSLER, J. A.:—

[The learned Judge stated the facts, and continued :]

It is impossible to say that there was not evidence on which the jury might not reasonably (if they believed it) find, as they have found, for the plaintiffs, and therefore, the motion as regards a new trial, was rightly denied by the Court below.

The only other question is as to the measure of damages,

Judgment.

OSLER
J.A.

and on this too, I think the Court appealed from has come to the right conclusion.

The contract was a very peculiar one. The plaintiffs agreed to go to New York and to bring up at their own expense a number of labourers, the defendant on his part agreeing to furnish them with work at \$1.25 per day. Now the direct profit to the plaintiffs from a transaction of this kind is not apparent, and their claim for the commission they would have received from the men cannot be entertained, because it necessarily depended upon the agreement to be made with the men, of which the defendant knew nothing, and could have known nothing when he made the agreement. It was not a damage or loss within the contemplation of the parties flowing out of the breach of contract. The same as to any other claim for loss of profit. I can see none which can be said to be legitimately connected with the breach. But whatever may have been the motives of the plaintiffs in making such a contract, whether charitable or speculative, their expenses in carrying it out were lost and thrown away when the defendant refused to perform it, and these expenses they must be entitled to recover.

The defendant says that it was not within his contemplation that the plaintiffs should pay the labourers' fares from New York to Lancaster; that they were not bound to do so. This would have been no answer if the case had been the converse of the present one, and the defendant had been suing for breach of the plaintiffs' contract to supply the labourers. If necessary in order to bring them to Lancaster, the plaintiffs would have had to pay their way, and therefore the cost of doing so, is a proper item of damage on breach of the contract by the defendant. I think the appeal and cross-appeal should be dismissed without costs.

MACLENNAN, J. A. :—

Judgment.

MACLENNAN
J. A.

I agree for the reasons given by my brother Osler that the finding of the jury in this case cannot be disturbed.

I also agree that the damages allowed to the plaintiffs by the learned trial Judge ought to be increased, and as I think the increase ought to be to the sum of \$890, I shall endeavour to express briefly the grounds of my judgment.

The agreement found by the jury was not an agreement between the labourers and the defendant made by the plaintiffs as the agents of the labourers, and on their behalf, and therefore the labourers would have had no action against the defendant.

The agreement was between the defendant and the plaintiffs, and having been broken by the defendant the plaintiffs are the persons aggrieved, and alone have a right of action, just as, if the plaintiffs had broken it, they alone could have been sued by the defendant. What the plaintiffs were to do was to go to New York, and to procure about 200 labourers for the defendant, and the evidence shews that what was meant was that they were to be brought from New York to Lancaster in time to begin work by the following Monday.

Now I think it must have been obvious to the defendant, as a railway contractor, that it would be a matter of most serious consequence to the plaintiffs if after they had brought this large number of men forward they did not obtain the promised employment. It must have been plain to him, as it would be to every person of any experience, that in such an event the plaintiffs would certainly not only lose their expenses, but might be exposed to claims for damages on the part of the men. The plaintiffs might or might not be able to get the men to come forward at their own charges, but whether they could or not they had to bring them forward; and I think it was so certain, or at all events so probable, that they would have to pay or advance the expenses of transportation, and that their expenses would be lost if the men were not employed, that

Judgment. this loss ought to be allowed as damages for the breach of the contract.

MACLENNAN
J. A.

But that was not all, the plaintiffs' business was the procuring of employment for their countrymen, and the contract they made with the defendant was a business transaction. The defendant could have had no reason to suppose that the plaintiffs were acting from merely benevolent or philanthropic motives, and as they did not stipulate for any compensation for their services it must have been clear to him that they were to receive their reward from the labourers. He must have known that the loss of this reward, whatever it might be, would be an inevitable consequence of the breach of the agreement on his part, and I think it was the direct and natural result of it, and must be held to have been in the contemplation of the parties.

I think, therefore, the plaintiffs are entitled to recover the three items of their claim as follows :

Expenses to New York, &c	\$25 00
Railway fares not reimbursed by the labourers	700 00
And \$1 per head commission	165 00
	<hr/>
	\$890 00

And therefore that the defendant's appeal should be dismissed with costs, and the plaintiffs' cross-appeal allowed with costs.

BURTON, J. A., concurred with HAGARTY, C. J. O., and OSLER, J. A.

Appeal dismissed with costs, and, MACLENNAN, J. A., dissenting, cross-appeal dismissed with costs.

HANDS V. THE LAW SOCIETY OF UPPER CANADA.

Barrister and Solicitor—Law Society—R. S. O. ch. 145, secs. 36, 44—Disciplinary Jurisdiction—Evidence not under oath—Discipline committee—Notice of meeting.

By sec. 44 of R. S. O. ch. 145, "An Act respecting the Law Society of Upper Canada," whenever a barrister or solicitor has been or may be found guilty of professional misconduct by the Benchers, "after due enquiry by a committee of their number or otherwise," it shall be lawful for the Benchers in Convocation to disbar any such barrister, and, by sec. 36 of that Act, upon any enquiry by committee the Benchers or committee shall have power to examine witnesses under oath.

Upon a charge of professional misconduct, the plaintiff attended before the Discipline Committee, the Standing Committee of Convocation to whom all charges of such nature are referred, and without objection allowed witnesses to make unsworn statements, and cross-examined them thereon, he also making an unsworn statement himself.

In calling the committee together, no notice of the meeting was sent to the treasurer of the Society, an *ex officio* member thereof, he being in Europe, and the notice to the other members did not state the purpose of the meeting. Subsequently the committee reported to Convocation that the complaint had been fully established, and recommended that the plaintiff be disbarred. Upon the consideration of this report the evidence was read before Convocation, and the plaintiff appeared with counsel and practically admitted the charge taking no objections to the proceedings, whereupon Convocation adopted the report and resolved that he be disbarred, &c. An action to have this resolution declared void, and to restrain further proceedings, was dismissed by BOYD, C., (16 O. R. 625.) This judgment was subsequently reversed by the Queen's Bench Divisional Court, (17 O. R. 300), whereupon the defendants appealed to this Court:—

Held, (reversing the decision of the Divisional Court) that the plaintiff having appeared before Convocation and substantially admitted the charge, and the propriety of the report of the committee, could not be permitted to say that the defendants had acted without "due enquiry," or to set up any irregularities there might have been in the preliminary proceedings.

Per HAGARTY, C. J. O., and OSLER, J. A. The power to take evidence under oath was, unless waived, imperative.

Per HAGARTY, C. J. O., and OSLER, J. A., also:—Notice to the treasurer was unnecessary.

Per BURTON, J. A.—The power to take evidence under oath was discretionary.

THIS was an appeal from the judgment of the Queen's Bench Division, reported 17 O. R. 300, reversing the judgment of BOYD, C., at the trial, reported 16 O. R. 625.

The facts are fully set out in the report of the case in the Court below, the question involved being the validity of the proceedings taken before the Benchers of the Law Society against the plaintiff, who was by resolution of

Statement.

Convocation declared unworthy to practise as a solicitor and disbarred.

The main objections to the validity of the proceedings were the following :—

1. That the complaint was referred by Convocation to the discipline committee, and that no notices of the meetings of the committee were sent to the treasurer of the society, who is *ex officio* a member of that committee, the treasurer being at the time in Europe.

2. That the notices of the meetings did not contain any statement of the nature of the business that was to be brought before the committee.

3. That the complainant and her witnesses were not sworn.

The action was tried before BOYD, C., at Toronto, on the 5th of November, 1888, and judgment was subsequently delivered dismissing the action with costs, but the majority in the Divisional Court reversed this judgment, and held that the proceedings were invalid.

The defendants appealed, and the appeal came on to be heard before this Court (HAGARTY, C. J. O., BURTON, and OSLER, JJ. A., and ROSE, J.,) on the 19th of September, 1889.

A. H. Marsh, and Walter Read, for the appellants. Notice to the treasurer would have been merely nugatory, as he was not in Canada and could not possibly have attended the meetings, and it was therefore unnecessary : *Smyth v. Darley*, 2 H. L. C. at p. 803 ; *Rex v. May*, 5 Burr. at p. 2682. *Rex v. Faversham*, 8 T. R. 352, will be cited on the other side, but the dictum in that case was obiter ; and in *Kynaston v. The Mayor of Shrewsbury*, 2 Str. 1051, which may also be relied on, notice was not given because, without enquiry, it was assumed that the person to be notified was out of town, which was not the fact. Then the committee had no judicial function to perform, but were merely acting in a ministerial capacity to take evidence, and the

correctness of the evidence taken by them is not disputed. Argument.
Subsequently the evidence taken by them was passed upon by Convocation, so that any objection as to the constitution of the committee is entirely immaterial. At any rate the plaintiff cannot now complain as he did not take the objection before the committee, but went on before it as constituted, and subsequently made a further defence before Convocation: *Osgood v. Nelson*, 10 B. & S. at pp. 165, 166, 172; L. R. 5 H. L. 636.

The same answer applies to the objection that no special attention was called to the nature of the business that was to come before the discipline committee. This is not a case like the club cases where a committee does not simply collect evidence, but exercises *quasi* judicial functions, and where it is only right that notice of the nature of the matter actually coming up should be given. *Cannon v. The Toronto Corn Exchange*, 27 Gr. 23, and *Marsh v. Huron College*, 27 Gr. 605, will be relied on. But these cases proceeded on the construction of specific by-laws requiring notice in a particular way, but here no notice of any kind is required. The committee can deal only with offences of a specific kind; and, when called together, each member knows that the business to be brought before the committee is business of that kind.

Nor is there any reason why the evidence should necessarily have been taken under oath. There is a discretion in this respect. The statute says that the Benchers "shall have power to examine witnesses under oath," and this gives them a discretion: *Queen v. Bishop of Oxford*, 4 Q. B. D., at pp. 553, 558, S. C. sub. nom. *Julius v. Lord Bishop of Oxford*, 5 App. Cas. at pp. 222, 223, 230, 231; *Macdougall v. Paterson*, 11 C. B. 755. Where there is a direct dispute as to facts it might be proper to take the evidence on oath, but where as in this case the facts are not really in dispute, and where the only question is whether the offence is of a sufficiently grave nature to justify the exercise of the power of disbarring, it is not necessary that the evidence should be taken under oath.

Argument.

This disciplinary jurisdiction was first given by 39 Vic. ch. 31 (O.), and the power was extended by 44 Vic. ch. 17 (O.), but there was no power to take evidence on oath. The words now in question were put in by the commissioners in revising the statutes in 1887, and the statutes as revised were validated by the Act bringing them into force. Conferring the power to take evidence on oath does not create the obligation to do so. It might be not unreasonably contended that it would be obligatory to do so where a new Court is being constituted and powers conferred upon it, but here there is simply an added power to a Court constituted years before, and this added power cannot be considered as taking away the power formerly enjoyed of taking the evidence without oath: *Whelan v. The Queen*, 28 U. C. R., at p. 117. Even if it were *prima facie* obligatory to take evidence under oath it is too late now to raise the question as the plaintiff without objection cross-examined the unsworn witnesses and gave his own evidence without any oath being administered: *Birch v. Somerville*, 2 Ir. C. L. R. 243; *Rickards v. Hough*, 30 W. R. 676; *Allen v. Francis*, 4 D. & L. 607; *Ridoat v. Pye*, 1 B. & P. 91; *Biggs v. Handsell*, 16 C. B. 562; *Lawrence v. Houghton*, 5 Johns. 129; *Turner v. Pearte*, 1 T. R. 717. The proceedings now in question are not of a criminal or *quasi* criminal nature, but are purely civil and there can be and has been waiver: *Osgood v. Nelson*, L. R. 5 H. L. at p. 652; *In re Hardwick*, 12 Q. B. D. 148. Here the admissions of the plaintiff were quite sufficient to justify the decision of Convocation.

Then in this case there is no right of action at all. Where a domestic forum is provided the Courts have no jurisdiction unless there is *mala fides* or entire want of jurisdiction. In this Province the Judges now and always have been visitors of the Law Society, and in all matters of discipline an appeal lies to them from the decision of the Benchers, and this appeal not having been taken the plaintiff cannot bring an action. It is true that the Benchers have been given the powers of visitors, but that

does not take away the powers previously held by the Judges as visitors, or if it does then the Benchers as visitors have passed upon this matter, and their decision cannot now be interfered with : *Essery v. Court Pride*, 2 O. R. 596 ; *Manisty v. Kenealy*, 24 W. R. 918 ; *Dawkins v. Antrobus*, 17 Ch. D. 615 ; *Queen v. Dean of Chester*, 15 Q. B. at pp. 520, 521 ; *Philips v. Bury*, 2 T. R. at pp. 353, 354 ; *King v. Bishop of Worcester*, 4 M. & S. 416 ; *King v. All Souls' College*, Skin. 12 ; *Attorney-General v. Archbishop of York*, 2 Russ. & M. 461. Argument.

C. J. Holman, for the respondent. Special power is given by statute to Convocation to delegate enquiries and matters of this kind to a committee. That must mean the committee as a whole, and all the members must be present. The committee was acting not ministerially merely but judicially, and a rule of the Law Society making three members of the committee a quorum could have no legal effect. While the treasurer was absent from Canada, the committee could not be properly constituted. At any rate notice should have been sent to him : *Fisher v. Keane*, 11 Ch. D. 353 ; *Regina v. Bailiffs of Ipswich*, 2 Ld. Rayd. 1232.

Then no proper notice was given to the members of the committee of the nature of the business that was to be brought before them. For all that appears in the notice the question involved might have been a trifling one of irregularity in a student's articles, and if the grave nature of the complaint had been set out, it is quite possible that more members of the committee would have attended, and that the result might have been very different : *Marsh v. Huron College*, 27 Gr. 605 ; *Labouchere v. Wharnccliffe*, 13 Ch. D. 346 ; *Fisher v. Keane*, 11 Ch. D. 353 ; *Rex v. Faversham*, 8 T. R. 352 ; *Dean v. Bennett*, L. R. 9 Eq. 625.

There was no power to take evidence except under oath. The power to examine means the power to take legal testimony, that is, on oath ; *Dwarris on Statutes*, p. 672 ; *Burn's Justice*, vol. III., p. 1075 ; *Regina v. Lewis*, 1 D. & L. 822 ; *Paley on Convictions*, 6th ed., pp. 120, 121 ; *Maxwell, In-*

Argument.

interpretation of Statutes, 2nd ed., p. 294 ; *Regina v. The Justices of Buckinghamshire*, 14 L. J. M. C. 45 ; *Regina v. Bishop of Oxford*, 4 Q. B. D. at pp. 259, 260 ; 5 App. Cas. at p. 222. It is different if the power is altogether a voluntary power, but if the thing must be done, and it is then said that it may be done in a certain way, then it must be done in that way : *Smith v. Goff*, 3 D. & L. 47 ; *Aitcheson v. Mann*, 9 P. R. 253, 473 ; *Rex v. Barlow*, 2 Salk. 609 ; *Croke v. Powell*, 2 E. & B. 210 ; *Bell v. Crane*, L. R. 8 Q. B. 481 ; *In re Neath and Brecon R. W. Co.*, L. R. 9 Ch. 263 ; *Taylor v. Taylor*, 1 Ch. D. 426 ; *Regina v. Tithe Commissioners*, 14 Q. B. 459 ; Dwarries on Statutes, p. 604.

The plaintiff did not object to the witnesses being examined without being sworn, because he was not aware of the provision, and he is not deprived of his right to now object : *Labouchere v. Wharncliffe*, 13 Ch. D. 346 ; *Marsh v. Huron College*, 27 Gr. 605 ; *Serjeant v. Dale*, 2 Q. B. D. at p. 568 ; *In re Rushbrook and Starr*, 46 U. C. R. 73.

The plaintiff was not given any proper opportunity of showing cause, and there was not a fair trial. It was not proper to have a report made against the plaintiff by the committee, and then to have this report submitted to Convocation for their approval so as to resolve the question into one as between the committee and the accused, the tendency naturally being to support the committee. Convocation should have themselves passed an independent judgment in the matter : *Labouchere v. Wharncliffe*, 13 Ch. D. 346 ; *Cannon v. The Toronto Corn Exchange*, 27 Gr. 23 ; *City of Exeter v. Glide*, 4 Mod. at p. 37.

No admissions were made by the plaintiff upon which action could have been taken, and in fact these admissions were not relied on, but Convocation assumed to proceed upon the evidence of witnesses, and this evidence did not prove the charge.

The powers of the Judges as visitors have been vested in the Benchers, and no such thing as visitors of the Law Society now exist : R. S. O., 1887, ch. 145, sec. 47, and clearly the Court has the right to interfere : *Rex v. Liver-*

pool, 4 Burr. 2244 ; *Rex v. Cambridge*, 8 Mod. 148 ; *Re Argument. Simmons and Dalton*, 12 O. R. 505 ; *Hevley v. Bates*, 13 Ch. D. 498 ; *In re Stewart*, L. R. 2 P. C. 88 ; *Combe v. De La Bere*, 22 Ch. D. 316.

A. H. Marsh, in reply.

January 14th, 1890. HAGARTY, C. J. O. :—

It is very much to be regretted that the proceedings before the Law Society should have resulted in furnishing grounds for the objections which have given rise to much difference of opinion among the Judges.

There is no reason whatever for questioning the good faith of all the proceedings taken, or to suggest that any other than a just result has been arrived at in the painful exercise of the Society's right to enquire into the conduct of, and remove, if necessary, any unworthy member from the honourable profession of which it is the guardian.

I only propose to notice two objections out of those urged against the action of the Society.

The first is, that the witnesses were not examined on oath. By 34 Vic. ch. 15, sec. 27, it was declared that on the hearing of any election petition, the Benchers should have power to examine witnesses under oath ; and also to compel the attendance of witnesses by subpoena. This is repeated in the R. S. O. 1877, ch. 138.

By 44 Vict. ch. 17, the jurisdiction exercised in this case was created.

Section 1. Whenever a barrister or attorney has been, or may be found by the Benchers, "After due enquiry by a committee of their members or otherwise," guilty of professional misconduct, &c., it shall be lawful for the Benchers in Convocation to disbar any such barrister, &c., and to resolve that any such attorney, &c., is unworthy to practise, &c. No provision whatever is made in this Act either as to taking evidence or compelling attendance of witnesses.

So the law remained until the R. S. O. 1887, ch. 145. In

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it the previous Acts are consolidated, and section 36 provides : "On the hearing of any election petition or upon any enquiry by a committee the Benchers or committee shall have power to examine witnesses under oath, and a summons under the hand, &c., for the attendance of a witness shall have all the force of a subpoena, &c."

This enactment came into force on the 31st of December, 1887, by proclamation.

The petition to the defendants complaining of the plaintiff's professional conduct appears to have been presented some time in May, 1888.

It was said, but it does not clearly appear, that none of the parties to the enquiry were aware of the new powers given for examination of witnesses.

This seems very singular as, previously, no statutable directions whatever existed as to how evidence could or should be taken, or any witness compelled to attend.

The question now arises whether the Legislature when it gives for the first time the power to enforce the attendance of witnesses, and in the same breath or sentence declares that it shall be lawful to examine them on oath, does not in effect prescribe that course of examination to be adopted.

Leaving it optional of course places it in the power of the tribunal to adopt or reject it as it pleases.

Blackburn, J., says in *Bell v. Crane*, L. R. 8 Q. B. at p. 482 : "There is no doubt that 'may' in some instances, especially where the enactment relates to the exercise of judicial functions, has been construed to give a power to do the act, leaving no discretion as to the exercise of the power when the facts are such as to call for it."

In *Taylor v. Taylor*, 1 Ch. D. at p. 431, Sir Geo. Jessel says : "It appears to me that the 16th section, though in form merely enabling, is in fact the only enabling part which entitles the Court to set the Act in motion. When a statutory power is conferred for the first time upon a Court, and the mode of exercising it is pointed out it means that no other mode is to be adopted."

In *In re Neath and Brecon R. W. Co*, L. R. 9 Ch. at p. 264, James, L. J., says: "The Act only says it shall be lawful. * * This is the usual courtesy of the Legislature in dealing with the judicature. 'It shall be lawful' means, in substance, that it shall not be lawful to do otherwise."

Mellish, L. J., says: "The usual mode of giving a direction to a Court of Justice is to say that it shall be lawful for the Court to do the act."

In *Regina v. Tithe Commissioners*, 14 Q. B. at p. 474, Coleridge, J., delivering the judgment of the full Court says: "The words undoubtedly are only empowering, but it has been so often decided as to have become an axiom, that, in public statutes, words only directory, permissive, or enabling, may have a compulsory force where the thing to be done is for the public benefit or in advancement of public justice."

In *Supervisors v. United States*, 4 Wall. 435, in the Supreme Court, it is said in the judgment of the Court: "The conclusion to be deduced from the authorities is, that where power is given to public officers * * —whenever the public interest or individual rights call for its exercise, —the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. * *

In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose a positive and absolute duty."

The subject is fully discussed, and the authorities reviewed in Maxwell's *Interpretation of Statutes*, 2nd ed., p. 286, *et seq.*

In this edition, the judgment of the Lords in *Julius v. Lord Bishop of Oxford*, 5 App. Cas. 214, is reviewed.

My brother Street has quoted from that judgment. It is, of course, the highest binding authority upon us. Exception is taken to some of the authorities already noticed by me. Sir John Coleridge's emphatic language in *Regina v. Tithe Commissioners*, 14 Q. B. at p. 474, is objected to

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Judgment. by Lords Penzance and Blackburn as loose or somewhat
 HAGARTY inaccurate.

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Lord Blackburn (at p. 244) excepts to the use of the word "public": "If by that is to be understood either that enabling words are always compulsory when the public are concerned, or are never compulsory except where the public are concerned, I do not think either was meant." He adds, "The enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right. It is far more easy to shew that there is a right where private interests are concerned, than where the alleged right is in the public only; and in fact, in every case cited, and in every case that I know of (where the words conferring a power are enabling only, and yet it has been held that the power must be exercised), it has been on the application of those whose private rights required the exercise of the power. * * I cannot agree that in the statute now in question, there is either a private, or a public right, requiring that this power given to the bishop must be exercised."

I see nothing in this case, or in any other case, to warrant our holding that whenever the Legislature has created a tribunal to try offences or exercise such powers of deprivation as are given in the case before us, and empowers that tribunal to compel the attendance of witnesses and to examine them on oath, that it can be left to discretion to exercise such powers or not.

It has been suggested that our Interpretation Acts have stamped unalterable meanings on such words as "shall" and "may." I can hardly think that the Legislature intended any change in the law.

In *Re Lincoln Election*, 2 A. R. at p. 341, Moss, C. J., says: "The statutory canon is exceedingly elastic, for the section is introduced with the qualification, 'unless it be otherwise provided, or there be something in the context or other provisions thereof indicating a different meaning or calling for a different construction.' No new rule was in fact introduced by this sub-section. The citations already

made will shew its identity with that established by judicial decision." This is the judgment of the full Court.

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HAGARTY
C.J.O.

I am unable to see how it can make any difference in the application of the statute that this power of examining on oath was not given in the original creation of the tribunal, but some years after. The first statute gave no power either to summon or to examine witnesses, and was necessarily almost inoperative. Then the necessary powers are given, with the provisions as to examining on oath. I think this was a creation of necessary procedure, and the words used must, I think, on the authorities, be held to be compulsory. We can, of course, easily understand that in cases where a person charged admits the whole charge, and therefore no evidence is required to be taken, that it is not necessary to resort to this provision: Wilberforce's Statute Law, 193, *et seq.*

We have now to consider whether the plaintiff is in a position to treat as fatal the taking of the evidence without oath.

According to such cases as *Osgood v. Nelson*, 10 B. & S. 119, L. R. 5 H. L. 636, this proceeding cannot be considered as of a criminal nature, although fairly characterized by Cockburn, C. J., in such words as these, "I own I can conceive of no jurisdiction more grave and serious in its character and consequences."

It is urged that the plaintiff by his conduct has waived all objection to the manner in which the evidence was taken. It would seem that neither he nor the committee knew of the existence of the power to take evidence on oath. He therefore did not knowingly waive the objection. The law would imply that both he and his judges knew the law.

Sir Geo. Jessel in *Labouchere v. Wharnccliffe*, 13 Ch. D. 346, puts the law in its strictest shape against any waiver or abandonment by conduct of technical objections. He set aside all the proceedings for the expulsion of a member of a club, one of the objections being the irregular manner in which the meeting had been convened. The plaintiff had attended it, and entered fully into his defence without ap-

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parently objecting. He was held entitled to say "Though the meeting is irregularly called, I have such a good case on the merits that I should like to take your opinion." But he was not bound to tell the meeting that it was irregularly or improperly called. This case goes further than any other that I have seen.

I think, as we must assume all parties here to be equally aware of this enactment, and as the plaintiff gave his evidence not under oath—and without objection either that the witnesses against him, were not sworn, or that he himself testified without oath, he ought to be held to have waived the necessity of following the statute in this particular.

The second objection refers to the discipline committee.

As to the treasurer, his absence from the country is a clear answer : *In re Portuguese Consolidated Copper Mines*, 42 Ch. D.160.

There were nine other members. Notice was sent to each of them, merely stating in effect that the discipline committee would meet at a named time and place. Nothing was said therein as to the nature of the business to be brought before them. The rules of the Society make three members to constitute a quorum ; four members attended and reported a *prima facie* case to be made out. A further meeting took place, convened apparently on a similar notice. The plaintiff appeared before them and the case was heard. Three members attended, and the report adverse to the plaintiff was agreed to, to be laid before Convocation.

The plaintiff knew nothing of the manner in which the committee was called together, and could not be said to have waived objection to it.

Now, it is argued that all the members notified should have been informed that this charge was to come up.

It is a serious objection. The plaintiff has thus, as he urges, been possibly deprived of the presence and opinion of some of the members who might have attended but for the vagueness of the notice.

Sir Geo. Jessel says, in *Labouchere v. Wharnccliffe*, 13 Ch. D. at p. 354: "I have had some experience of clubs, and I am aware that when a committee has once expressed an opinion, there is a great tendency on the part of the club generally to support that opinion, simply because it is the opinion of the committee."

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HAGARTY
C.J.O.

It is argued that if this be a serious objection in the case of the removal of an obnoxious member from a social club, it is still more objectionable in a body acting judicially and exercising such formidable powers as the Law Society.

In *Cannon v. Toronto Corn Exchange*, 27 Gr. 23, 5 A. R. 268, Proudfoot, J., held that the expulsion of a member could not be upheld, having been ordered at a meeting called on notice to receive a report from a committee regarding the conduct of a member of the association and other business.

In *Fisher v. Keane*, 11 Ch. D. 353, the objection was naturally held fatal, that the committee of the club proceeded to decide that the plaintiff should be requested to resign without notice to him. The rules also required that the committee be specially summoned—the ordinary quorum was three. Jessel, M. R., says (p. 359): "The character and prospects in life of any member of this club may be irremediably blasted—for that is the result—by the decision of any three casual members of the committee who happen to walk in on a week day, having no notice of what is about to be brought before them, but merely with the intention probably of auditing the cook's accounts, or attending to some equally trivial matter." He afterwards (p. 360) notices the tendency at the general meetings to support the committee. "Another may say: 'Oh, we must support the committee; they have acted to the best of their judgment. They are all honourable men—men in whom we have the greatest confidence; if we do not support them they will resign, and it will break up the club.'"

If we are to consider this case as that of a club expelling one of its members these cases would be sufficient to justify

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C. J.O.

the objection ; but Convocation, by a committee of three members or otherwise, are entitled to deal with this unpleasant case. If therefore, we find that substantially and fully they investigated the case, heard or read the evidence, then heard the plaintiff and his counsel, and then gave their decision, the case assumes a different aspect.

I have had the advantage of reading my brother Rose's judgment, in which he very fully and carefully reviews this part of the case, and I refer thereto for its clear statement of the proceedings of Convocation.

I have given the case much anxious consideration, and have not been wholly free from doubt. But on the whole I think the judgment of the learned Chancellor should be restored.

I must say that I think some change is required in the law governing the disposal of cases of this nature. Objections such as those urged here, will, unless scrupulous care be taken, constantly arise. Besides the Law Society can apply no remedy except expulsion.

I refer to the remarks of Martin, B., in delivering the opinion of the Judges to the House of Lords, in *Osgood v. Nelson*, L. R. 5 H. L. 636, as to the proceedings before the corporation when the report of the committee was before them. The plaintiff attended with his counsel, who addressed them at length, and was asked if he had any further evidence, to which he stated that he had not, and was content to take the case as it stood.

The Judges considered that he had had a very fair trial. The Lords affirmed the decision of the Queen's Bench.

I refer to the language of Cockburn, C. J., in the Court below, (10 B. & S. at p. 166). After commenting on the taking of evidence before the committee, he says: "The plaintiff had notice to attend and shew cause why he should not be removed from his office, he did attend and was heard by counsel; he did not ask to have the evidence taken in any other form, or that additional evidence should be taken; his learned counsel invited the Common Council to act upon the evidence then before them."

BURTON, J. A. :—

Judgment.

BURTON
J.A.

The plaintiff complains that the Benchers of the Law Society have passed a resolution declaring him unworthy to practise as a solicitor, and have ordered him to be disbarred, and prays that the resolution may be declared void and ordered to be rescinded, or that he be restored to the roll of solicitors.

With regard to the charge on which the resolution was based, he alleges that it was wholly untrue, and he refers to certain alleged irregularities in the proceedings which he claims vitiated them.

The Law Society sets forth the nature of the charge made to them and their proceedings upon the petition, alleging that they were entirely regular and legal.

The learned Chancellor held the proceedings to have been regular and sufficient, and dismissed the bill, but his decision was reversed by the Queen's Bench Division—Falconbridge, J., dissenting.

We are dealing now with that judgment. The main ground on which the Court apparently proceeded was, that the evidence was not taken under oath.

The Law Society were empowered to investigate charges of this nature, and to disbar the party found guilty of them if amounting to professional misconduct, or of conduct unbecoming a barrister or solicitor, by an Act passed in 1881.

The power to administer an oath to witnesses on such an investigation was conferred by a later statute, was in fact introduced on the last revision, and first became law in December, 1887, and the question is, was that an additional power to be exercised by the Benchers in their discretion, or was it imperative ?

In *Julius v. Lord Bishop of Oxford*, 5 App. Cas. 214, the decisions are all reviewed, and, as I understand the final decision in the House of Lords, such words as were used here are potential, and never (in themselves) significant of any obligation. That the question whether a Judge or public officer,

Judgment.

BURTON
J.A.

to whom a power is given by such words, is bound to use it upon any particular occasion, or in any particular manner, must be solved *aliunde*, and in general it is to be solved from the context—from the particular provision,—or from the general scope and objects of the enactment conferring the power.

Lord Penzance expressed his entire concurrence in what had fallen from the Lord Chancellor as to the construction of such words. “The words ‘it shall be lawful,’” he says, (at p. 229) “are distinctly words of permission only; they are enabling and empowering words. They confer a legislative right and power on the individual named to do a particular thing, and the true question is not whether they mean something different, but whether, regard being had to the person so enabled—to the subject matter, to the general objects of the statute, and to the person or class of persons for whose benefit the power may be intended to have been conferred—they do, or do not, create a duty in the person on whom it is conferred, to exercise it.

The Lord Chancellor after referring to the diversity of opinion in the cases which were referred to, among others—*Alderman Backwell's Case*, 1 Vern. 152; *Rex v. Barlow*, 2 Salk. 609; *Rex v. Havering-atte-Bower*, 5 B. & A. 981; *Macdougall v. Paterson*, 11 C. B. 755; *Morrisse v. Royal British Bank*, 1 C. B. N. S. 67; *Regina v. Tithe Commissioners*, 14 Q. B. 459, (says, p. 225) “They appear to decide nothing more than this: that where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised.”

For many years the Benchers had exercised the power of investigating charges against members of the profession without administering an oath, and there are, no doubt, many cases in which that formality would be quite unnecessary, but there might be some cases in which the

Benchers themselves might think it desirable to examine the witnesses under oath; the right is not given to the individual charged to insist on the witnesses being sworn; though no doubt such a request would be complied with in all cases by the Benchers, but the power is given to the Benchers to be exercised, as I think, in such cases as they think it desirable to do.

Judgment.

 BURTON
J.A.

The result of the decision in the *Bishop of Oxford's Case*, as I understand it, is, that it lies upon the parties who contend that an obligation exists to show something which, according to the principles above referred to, creates the obligation.

Lord Justice James had in one case, previous to the decision in the *Bishop of Oxford's Case*, laid it down that the use of the words, "It shall be lawful," was the usual courtesy of the Legislature in dealing with the judicature, and meant in substance that it should not be lawful to do otherwise.

The extraordinary diversity of opinion to be found in these cases, furnishes a strong reason for the passing of an Interpretation Act; and I think the passing of such an Act may be regarded as a gentle intimation by the Legislature to the Courts that it understands what it is saying and means what it says.

I should myself have thought, apart from the Interpretation Act, that the power given here was one to be exercised by the Benchers in their discretion, but unless that Act is to be regarded as so much waste paper, I think it impossible to say, read in the light of that enactment, that it means anything more than what it expressly says.

We had occasion to consider the provisions of that Act in *Re Lincoln Election*, 2 A. R. 324, although it became unnecessary to go very fully into the question, as we came to the conclusion that with or without the aid of the Act the words were compulsory, and the only question was upon whom they were compulsory.

In declaring that certain words and phrases shall have a particular meaning the Legislature has, speaking generally,

Judgment.

BURTON
J.A.

adopted certain canons of construction previously dependent on judicial decision, but with, I think, this important qualification that whilst before the statute the Courts could so to speak look outside the statute, the meaning is now to be gathered from the words used in the Act "unless there be something in the context or other provisions of *the Act itself*," indicating a different meaning, or calling for a different construction.

I am of opinion that the power was discretionary, and that that objection to the proceeding of the Benchers fails.

Upon the question of the plaintiff being guilty of such misconduct as warranted the finding of Convocation, that body had clearly jurisdiction to enter upon the enquiry, and having that jurisdiction are constituted by the Legislature sole judges of whether the charge was substantiated, and no Court has power to review their decision upon the merits.

I have had more doubt as to the sufficiency of the notice to the committee in omitting to specify the particular nature of the charge for which the meeting was called; but in the absence of any evidence of *mala fides*, and considering the subsequent conduct of the plaintiff and his counsel, who had every opportunity of being heard before Convocation, and who were evidently under the impression that there was no object in struggling with the facts, and based their hopes on the clemency of the Benchers by reason of the restitution that had been made, I think no sufficient reason has been shown for interfering with the judgment of the learned Chancellor, and that it should be restored.

OSLER, J. A. :—

Mr. Marsh argued very earnestly that the plaintiff had no *locus standi* in an action of this kind until he had exhausted all the remedies open to him by means of an appeal to the Benchers in Convocation, in whom are now

vested by the 47th section of the Law Society Act, the visitatorial powers which were formerly vested in the Judges, but of which by that Act they were deprived. I think he pushed his argument so far as to contend that there was no other method by which the action of the Benchers could be reviewed. The foundation of this argument is wanting, because in my opinion there is no such appeal. The object of the 47th section of R. S. O. ch. 145, plainly is to deprive the Judges of any power or right to interfere as visitors with the action of the Benchers in the new jurisdiction conferred upon them in matters of discipline, not to vest in the latter a distinct jurisdiction to be independently exercised *quâ* visitors by way of review of their action *quâ* benchers.

Judgment.

OSLER
J. A.

I shall, therefore, proceed to consider the objections to the proceedings of the discipline committee and of Convocation, which are, I think, reduced to three—viz. :

1. That the notice of the 9th of June, calling the meeting of the committee, was not sent to the treasurer, who is *ex officio* a member of the committee.

2. That the notice did not specify the particular business for which the committee was called together.

3. That the evidence taken by the committee, and reported to and acted upon by Convocation, was not taken upon oath.

I do not feel much doubt about the first and second of these objections, assuming that it is open to the plaintiff to complain of the action of Convocation or the committee in these respects. My present impression is, that except in so far as their proceedings are opposed to some statutory requirement, it is not for us (as was said in *Osgood v. Nelson*, L. R. 5 H. L. 636) to consider whether the procedure or course of proceeding adopted by Convocation, who, for this purpose, are a judicial body, was right or wrong, expedient or the reverse. If the plaintiff had a full opportunity of defending himself from the charges made against him, and the evidence was properly taken, I think that is all that can be required.

Judgment.

OSLER
J.A.

As regards the first objection, notice was duly sent to nine of the ten members of the committee, but was not sent to the treasurer, because he was then absent in Europe. It would have been useless to send him a notice, and three of the committee being a quorum, its functions were not suspended merely because of the absence of one of the members. There is clear authority, if authority be needed, for the course adopted, in decisions in analogous cases. In *Smyth v. Darley*, 2 H. L. C. 789, the question was whether the election of treasurer for the county of the city of Dublin was valid. The recorder was a person entitled to vote, but he had not been summoned to attend. Lord Campbell said (p. 803): "The election being by a definite body on a day of which, till summons, the *electors* had no notice, they were all entitled to be specially summoned, and, if there was any omission to summon any of them, unless they all happened to be present, or unless those not summoned were beyond summoning distance—as for instance, abroad—there could not be a good electoral assembly." And in *In re The Portuguese Consolidated Copper Mines*, 42 Ch. D. 160, a meeting of directors was held illegal, because due notice of it had not been given. *Per* Esher, M. R., "In my opinion he (the director) could not waive his right to notice. As he was within reach, and it was perfectly possible to give him notice, it was the duty of the directors to give him notice of the meeting."

The second objection is, I think, met by the fact that the plaintiff's case was the only matter before the committee for investigation. The discipline committee is one of the standing committees of Convocation. It deals only with matters specially referred to it by Convocation; those matters themselves being of a special nature—namely, complaints of professional misconduct or of conduct unbecoming a barrister, solicitor, student-at-law, or articled clerk; R. S. O. ch. 145, sec. 44; Standing Rules of Convocation, sec. 12; Committees 25; Discipline.

The particular complaint against the solicitor had been

referred to the committee in May, 1888, to report whether a *prima facie* case had been made out. On the 1st of June, the committee reported that in their opinion such a case had been made out, and recommended an investigation. Their report was adopted and the complaint referred to the committee to report thereon. We are not embarrassed by the decisions in the club cases, and in *Marsh v. Huron College*, 27 Gr. 605, and *Cannon v. Toronto Corn Exchange*, 27 Gr. 23, where by the rules of the institutions there in question, it was expressly provided that the notice calling the meeting at which the proceedings complained of took place, should be specially underwritten with the object of the meeting, and where the functions of the committee concerned the ordinary, as well as the special business of the club or other institution. All that is necessary to be shewn here is that the members of the committee were sufficiently apprised of the object for which they were called together; and that, as the committee dealt only with matters of discipline specially referred to them, and there was only this one particular matter before them, is, in my opinion, properly to be inferred.

I have felt more difficulty with the third objection. I incline to agree with Street, J., in the Court below, that the language of the 36th section of the Act, cannot be regarded as merely facultative or permissive. As the learned Judge points out, the only power the defendants ever had to examine witnesses on an enquiry of this kind, is coupled with the power to examine them on oath; and looking at the subject matter of the enactment—that is to say, the nature of the thing empowered to be done, the object for which it is to be done, and the conditions under which it is to be done,—I think the imperative construction is required. We must take the section as it stands: “On the hearing of any election petition, or upon any enquiry by a committee, the Benchers or committee shall have power to examine witnesses under oath.”

The construction of this clause cannot I think depend upon the mode in which the amendment extending the

Judgment.

OSLER
J.A.

Judgment.

OSLER

J.A.

power to the committee was introduced, for, if we adopt that argument, it would be necessary to construe the same words in the same clause as imperative in the case of the hearing of an election petition by the Benchers, and permissive merely in that of an enquiry by a committee, which seems altogether inadmissible. Some reliance has been placed upon the Interpretation Act, R. S. O. ch. 2, sec. 8, sub-sec. 2, by which it is enacted that the word "shall" is to be construed as imperative, and the word "may" as permissive, but I entirely agree with the view expressed by the late Chief Justice Moss in *Re Lincoln Election*, 2 A. R. at p. 341, without dissent on the part of the other members of the Court, that no new rule is introduced by this sub-section, and that it is declaratory only of that established by judicial decision. I think this enactment we are now considering comes plainly within the conditions which in *Julius v. Lord Bishop of Oxford*, 5 App. Cas. 214, are laid down as those under which an imperative construction ought to be placed upon language which in terms is enabling only. I refer to *Darby v. City of Toronto*, 17 O. R. 554.

If, therefore, the Benchers in Convocation had acted simply upon the evidence as reported to them, and the report of the committee, I should, as at present advised, have been unable to arrive at the conclusion that the plaintiff had been legally deprived of his status of barrister and solicitor. But the case does not rest there. The Benchers are authorized to proceed after due enquiry by a committee of their number or otherwise. If their action proceeds simpliciter upon evidence taken *in invitum*, it appears to me that it must be sworn evidence, because in my opinion the Act requires it.

But they are not precluded from acting upon admission or consent, just as Courts more formally constituted may do. "Due enquiry" may be had in that way as well as upon testimony obtained in a more formal way, and when the barrister charged, being called upon to shew cause, instead of declining to appear or objecting to the right of the Bench-

ers to act upon testimony irregularly taken, appeared and substantially admitted the charge and the propriety of the committee's report, I think he cannot afterwards be permitted to say that they acted without due enquiry. The case may be compared to that of *Rex v. Middleton*, Fortescue, 201, where, upon counsel moving against the defendant for an attachment for a libel, he came into Court voluntarily and confessed that he was the author, "And it was so recorded, and he was fined and ordered to find sureties for his good behaviour."

Judgment.

OSLER
J.A.

There is much in the way in which the proceedings were conducted, which is calculated to impress one unfavourably, but upon the whole, I do not think I can differ from the view which my brother Rose takes of the evidence as establishing a clear admission by the plaintiff of the substantial charge made against him by his client. To apply the language of Kelly, C. B., in *Osgood v. Nelson*, 10 B. & S. at p. 173, the plaintiff was content to deal with the case upon the evidence as it had been taken before the committee, and as it was then before the Benchers. He had a full, free, fair, and ample hearing, and every opportunity to defend himself against the charges prepared against him.

I think the appeal should be allowed, and the judgment of the learned Chancellor restored.

I wish to add that I am not in sympathy with the contention so much pressed upon us, that the action of the Law Society was harsh in striking the plaintiff off the rolls for mere non-payment of money, restitution having been made pending the hearing of the charge. The charge was much graver than that of mere non-payment, which itself is not to be regarded as a slight or dispensable offence. There was absolute misappropriation, and in the recent case of *Re Groom*, 88 L. T. 50, which in some respects is not unlike the present, but in which some elements of aggravation which appear here were wanting, the Court thought the solicitor ought to be struck off the rolls.

Judgment. ROSE, J.:—

ROSE, J.

It is not necessary to set out the facts, which appear in the judgments of the learned Chancellor and of STREET, and FALCONBRIDGE, JJ.

I desire to consider the action of the Benchers, and to enquire whether in pursuance of their statutory powers they passed the resolution complained of "after due enquiry." If they did then their action must in my opinion be sustained.

[The learned Judge stated the steps taken by the Benchers and continued:]

It seems to me clear that there was no substantial dispute as to the facts, nor as to the proper conclusion to be drawn from them, but that the plaintiff and his counsel agreed that the best course was practically to plead guilty, and plead the restitution in mitigation of sentence.

If the Benchers made "due enquiry," if they had the facts before them, enquired into them, heard what the accused and his counsel had to say, considered what they chose to say, and then came to a conclusion upon such enquiry, was not the learned Chancellor quite right in saying that "The conduct of these final proceedings, tested by the rules recognized by the Lords Justices of Appeal in *Dawkins v. Antrobus*, 17 Ch. D. 615, was scrupulously fair, and just, and all cause of complaint as to procedure was thereby effectually removed."

I adopt the reasoning and conclusion of the learned Chancellor as to the effect of the restitution, and think it unnecessary to put in my own language what he in conclusion said with much greater elegance of diction than I can command.

Adopting the views I have thus endeavoured to express, I am not troubled about the evidence taken before the committee not having been taken on oath. I was much impressed with the argument that the power is an added one, and that the option to take evidence either on oath or without oath exists; but there is so much to be said in

support of the contrary view, that I am glad to be relieved from expressing any decided opinion on the question.

Judgment.

ROSE, J.

I am clear that the plaintiff having, with knowledge of the law, which it must be assumed he had, abstained from objecting both before the committee and the Benchers, has waived the objection. See Broom's Legal Maxims, p. 158. Nor does it seem to me that the fact of the committee having reported, can avail as an objection, even assuming that the preliminary proceedings were irregular. Surely the Court cannot be asked to put the plaintiff in a better position than that assumed by his counsel when before the Benchers?

Can any one say that the Benchers could by any possibility have been improperly influenced by the recommendation "That he be disbarred, and that his name be erased from the roll of solicitors?"

Either that punishment or nothing; and reading the evidence and the judgments in the Courts below, I confess I cannot see how such conduct could possibly have gone unpunished.

As to the correctness of passing over all preliminary objections, and considering the action of the Benchers in Convocation, I refer to *North West Transportation Co. v. Beatty*, 12 App. Cas. 589, especially at p. 600.

I have not felt pressed by the club cases cited, as the objections to the proceedings in those cases were to proceedings before the tribunal to which had been committed judicial work upon which action was to be founded, but here as I take it the judicial tribunal was Convocation, and I find no irregularity in its proceedings.

In my opinion the appeal should be allowed, effect given to the dissentient judgment of my brother Falconbridge, and the judgment of the learned Chancellor restored.

Appeal allowed with costs.

SWIFT V. THE PROVINCIAL PROVIDENT INSTITUTION.

Life Insurance—Benevolent society—R. S. O. (1877) ch. 167—47 Vic. ch. 20, (O.)

The "Act to secure to Wives and Children the Benefit of Life Insurance," 47 Vic. ch. 20 (O.), applies to insurances in societies incorporated under the Benevolent Societies Act, R. S. O. (1877) ch. 167.

Re O'Heron, 11 P. R., 422, overruled.

Judgment of PROUDFOOT, J., reversed, BURTON, J. A., dissenting.

Statement.

THIS was an appeal from the judgment of PROUDFOOT, J.

The defendants were a benefit society incorporated under the provisions of R. S. O. (1877) ch. 167, and on the 21st of August, 1886, issued a certificate of insurance to Leonard Baldwin Vaughn, wherein it was declared and covenanted that upon his death, while the certificate was in force, the defendants would within sixty days after due notice and proof of death pay to Charles Francis Vaughn, his son, or to the legal representatives of Leonard Baldwin Vaughn, the sum of \$2,000. Leonard Baldwin Vaughn died on the 4th of October, 1887, and at the time of his death Charles Francis Vaughn was an infant under the age of 21 years. No trustee was named in the certificate to receive the insurance money, and by an order of the High Court of Justice made on the 28th of November, 1887, under the provisions of 47 Vic. ch. 20 (O.) on an application by Sarah Felicia Vaughn, wife of the deceased, the plaintiff was appointed trustee upon giving security to the satisfaction of the local Master at Sarnia. The plaintiff gave security pursuant to this order, and thereupon brought this action to recover the money payable under the certificate.

The defendants demurred on the ground (among other grounds) that the Act, 47 Vic. ch. 20 (O.), did not apply to societies incorporated under R. S. O. (1877) ch. 167, and that the plaintiff had no *locus standi*.

The demurrer was allowed with costs by PROUDFOOT, J., who followed his previous decision in *Re O'Heron*, 11 P. R. 422.

The plaintiff appealed, and the appeal came on to be ^{Statement.} heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A.) on the 19th of November, 1889.

G. M. Rae, for the appellant.

J. S. Robertson, for the respondents.

January 14th, 1890. HAGARTY, C. J. O. :—

Apart from one or two small technicalities as to numbers of statutes, the substantial question seems to be, as stated by the learned Judge, whether 47 Vic. ch. 20, (O.), applies to a corporation like that of the defendants.

The policy is dated August, 1886, and the incorporation was under 37 Vic. ch. 34, consolidated in chapter 167 of R. S. O., (1877,) I quote from the latter Act. It excludes associations for "trade or business," or any purpose provided for in any of the Acts in the schedule. No. 10 in the schedule is the Mutual Fire Insurance Act, R. S. O. ch. 161.

Section 11 provides for the case of money becoming due on the death of any member, excluding claims of creditors up to \$500.

47 Vic. ch. 20, (passed March, 1884) is headed "An Act to secure to wives and children the benefit of life insurance."

Section 1 declares the Act shall "apply to every lawful contract of insurance now in force or hereafter effected which is based on the expectation of human life, and shall include life insurance on the endowment plan, as well as every other."

Section 12 declares that if no trustee be named in the policy, &c., the money may be paid to the executors or to a guardian duly appointed, or to a trustee appointed by the High Court of Justice, &c., and payment to him shall be a good discharge to the insurance company.

The plaintiff here was regularly appointed trustee if this Act applied to the defendant company.

Judgment.

HAGARTY
C.J.O.

Reading the statute by itself, and in the light of existing laws, both as to ordinary insurance companies and benevolent associations, I would certainly hold it as covering the species of insurance appearing in this case. Its main object seems clearly to be the security of life insurances, and to facilitate and provide means to recover the amount, and its first section is made specially comprehensive to embrace every species "based on the expectation of human life."

I think the statement of claim here brings the defendants under the Benevolent Companies' Act, and that it does not appear to be a company for trade or business. The deceased was a member, and on his death the defendants were to pay \$2,000 to his infant son, whom the present plaintiff represents, from funds to be realized out of assessments on the members.

This I think is within the first section already quoted. It is clearly a life insurance. The Benevolent Societies Act in the consolidation of 1887, follows the revision of 1877. It contains the same provisions as to "trade or business, and any purpose provided for by any of the Acts mentioned in the schedule to this Act." No. 10 in that schedule is chapter 167, entitled An Act respecting insurance companies. Also No. 2, chapter 157, as to incorporation of joint stock companies by letters patent.

This latter Act forbids (section 4), as in the revision of 1877, the granting of letters patent for the working of railways, and "the business of insurance."

The companies mentioned in that Act seem all to be for business purposes, with capital stock, shareholders, &c.

Chapter 136 of the revision of 1887, embodies 47 Vic. ch. 20. Its title is the same, and section 1 extends its provisions to every lawful contract of insurance in the comprehensive words already cited from the earlier Act.

I think the Legislature in providing facilities for insurances as to wives and children, and facilitating the collection at a moderate cost of the amount insured, intended by the language used to cover all classes of insurance,

whether effected with ordinary stock companies or with benevolent associations not formed for business or profit, but simply for the benefit of its members.

Judgment.
HAGARTY
C.J.O.

It is difficult to see why or how they should design to draw a sharp line between the two classes. Both are equally for the benefit of wives and children; and the whole substance of the matter was and is a contract of insurance, in their own language, "based on the expectation of human life."

The appointment of the plaintiff as trustee was made in November, 1887. In the March following, the 51 Vic. ch. 22, was passed. Section 1 declared that the expressions "contract of insurance," "policy of insurance," and "policy," wherever they occur in the Act to secure to wives and children the benefit of life insurance, include any certificate or contract hereinafter mentioned, or in any way relating to life insurance.

Section 2 expressly declares that "the provisions of the said Act extend and apply to membership, beneficiary and other certificates and contracts relating to life insurance issued or entered into by any society or association of persons, &c., among the purposes of which is the insurance of the lives of the members thereof exclusively," &c. At the end of the section it includes certificates or contracts heretofore issued.

I presume this Act was probably passed in consequence of a decision of Proudfoot, J., in a case of *Re O'Heron*, 11 Pr. R. 422, in 1886, and to remove doubts. My judgment would be against the judgment of that learned Judge without any reference to that statute. But as the last Act reads it seems to me merely to declare what by the judgment of the Legislature is the true extent and meaning of the Wives and Childrens' Act. It says that the language thereof "includes" the certificate of insurance now before us, and that the Act "extends and applies" to such certificates and modes of insurance. There is no word of future application, but a formal present declaration that the former Act does extend to and cover a case like that before

Judgment.

HAGARTY
C.J.O.

us for judgment. It is an Act passed and in operation before this action was commenced.

Prior to its becoming law the High Court of Justice appointed the present plaintiff as trustee, considering as we must presume, that the Wives and Childrens' Act applied. My learned brother Proudfoot a year before this order had decided in the *O'Heron Case* as he did in the case before us.

We are now asked to decide on the meaning and extent of the Wives and Childrens' Act, and I now respectfully adopt the view of the Legislature as declared in its last Act, that the statute in question does "include" and "extend to" an insurance like the present.

To hold this statute declaratory or retrospective, does not interfere with any existing right or interest, but may rather be held to refer to matters of "procedure," which have generally been held to affect pending as well as future litigation.

The general principle on this question is elaborately discussed in the Lords, *Gardner v. Lucas*, 3 App. Cas. 582, especially Lord Blackburn's judgment, p. 602. See also *Kimbray v. Draper*, L. R. 3 Q. B. 160.

OSLER, J. A. :—

The distinction between a company which carries on the business of insurance for the purpose of gain, and an association for the purpose of mutual insurance, is well pointed out in the recent case of *New York Life Insurance Co. v. Styles*, 14 App. Cas. 381, and I refer to the judgment of Lord Macnaghten as containing a description of just what the members of a company incorporated under the Benevolent Societies Act may do through the medium of the company upon the principle of Mutual Life Insurance. He says, (p. 411): "Certain persons agree to insure their lives among themselves on the principle of mutual insurance. They take care to admit none but healthy lives. They contribute according to rates fixed by approved tables, and

they invite other persons to come in and join them by insuring their lives on similar terms. The rates fixed by the tables are taken as being sufficient to provide for expenses, to meet liabilities, and to leave a margin for contingencies." And per Lord Herschell, (p. 409): "In the case before us, certain persons have associated themselves together for the purpose of mutual assurance; that is to say, they contribute annually to a common fund, out of which payments are to be made in the event of death to the representatives of the persons thus associated together. These persons are alone the owners of the common fund, and they and they alone, are entitled to the management of it. It is only in respect of his membership that any person is entitled to be assured a payment upon death."

Judgment.

 OSLER
J. A.

Companies incorporated under the Benevolent Societies Act, are really a species of mutual benefit society, and as they may be incorporated for any benevolent or provident purpose or for any other purpose not illegal, save for that of trade or business, and certain specially excepted purposes, it seems impossible to deny, especially in the face of section 3, sub-section 2, and section 2, sub-sections 4 and 6 of the Ontario Insurance Act, and of 51 Vic. ch. 22, that such companies might even before the passage of the Ontario Insurance Act, enter into contracts of mutual life insurance for the benefit of their own members exclusively; nay, more, that this may have been the very object of the incorporation of the defendant company.

I quite agree that it would not at first have been very likely to occur to any one that a system of mutual life insurance on a large scale was capable of growing up or of being organized under the Benevolent Societies Act, yet mutual life insurance is essentially a "provident" purpose, and as such within its very terms. There is nothing in our Act except the words "benevolent or provident purpose," as there is in some of the English Benefit or Friendly Societies' Acts, to control the scope of the 1st section, nor have we, as there is in England, a line of previous legislation on the subject, to aid us in discovering the intention

Judgment.
OSLER
J.A.

of the Legislature ; and we have no reason to suppose that our Act is founded upon or has relation to the Imperial Act. There are, perhaps, difficulties in reconciling some of the provisions of the Benevolent Societies Act with those of the Wives and Childrens' Insurance Act, but it appears to me that their existence is not a legitimate argument against the application of that Act, as they are not removed by the passage of the Act of 1888, 51 Vic. ch. 22.

We are not to assume against the rather loosely drawn pleading that the company is one incorporated for a life insurance *business* strictly so called. It is alleged to be incorporated under the Act, R. S. O. ch. 167, which properly means the revision of 1877, and we are, therefore, to assume that it is such a life insurance company as may legally derive its existence under that Act. If that be so, the contracts which they can enter into, are unquestionably such as are comprised within those enumerated in section 2, sub-sections 4 and 6 of the Ontario Insurance Act, and come within the very terms of the 1st section of the Act relating to insurances for the benefit of wives and children, 47 Vic. ch. 20, R. S. O. 1887, ch. 136, and the provisions of that Act relating to the appointment of a trustee are applicable.

There can be no doubt, looking at sections 12 and 13, and more particularly at section 19, of the Act, as to the right of the trustee to maintain an action in his own name for the money to which the infant is entitled under the policy or beneficiary certificate.

I think the appeal should be allowed.

MACLENNAN, J. A. :—

It is clear that the statute referred to in the first paragraph of the statement of claim must be regarded as chapter 167 of the of Revised Statutes of 1877, because the proper designation of therevision of 1887, is " The Revised Statutes of Ontario, 1887."

This statute was first enacted in 1874, 37 Vic. ch. 34, and

is substantially the same as afterwards revised in 1877. Judgment.
 It authorizes incorporation for any benevolent or provident purpose; or for any other purpose not illegal, save and except the purpose of trade or business; and any purpose not heretofore provided for by any of the Acts mentioned in the schedule. MACLENNAN
J.A.

Among the Acts enumerated in the schedule are the Act respecting mutual insurance companies, and the Act to consolidate the laws relating to such companies, and the Act authorizing the formation of companies or co-operative associations for the purpose of carrying on in common any trade or business.

In the same year, 1874, was passed the Act 37 Vic. ch. 35, respecting the incorporation of Joint Stock Companies by letters patent, which was declared to be applicable for the incorporation of companies for any purposes or objects within the Legislative authority of the Legislature of Ontario, except railways and insurance.

When the Act 37 Vic. ch. 34 was consolidated in 1877, it still excluded from the purposes of any company to be incorporated under it "trade and business," and also the purposes provided for by any of the Acts in the schedule.

Among the Acts in the schedule are the Letters Patent Act, the Act respecting Co-operative Associations, and the Act respecting Mutual Fire Insurance Companies. The Letters Patent Act, R. S. O. ch. 150, sec. 3, excepts from its provisions the business of insurance; the Act respecting Co-operative Associations, R. S. O. ch. 158, does the same thing by section 1, and the result of an examination of all the Acts mentioned in the schedule is, that while the business of mutual fire insurance is excluded from the purposes for which incorporation may be obtained under the Act, association for the purpose of mutual life insurance is not excluded unless it comes within the general words "trade or business."

I am of opinion that an association of persons for mutual life insurance is not a "trade or business" within the meaning of the exception. I think it is clearly not a *trade*, and

Judgment.
MACLENNAN
J.A.

although it is not so clear, I also think it is not a business. Every benevolent and provident society must necessarily have some business to transact; it must have a board of management and officers to administer its affairs and transact its business. We should make the Act wholly nugatory to hold mutual insurance to be outside of the Act for that reason. The Act provides for trustees and managing officers, treasurer and secretary, for conducting the company's affairs. (Sections 2 and 3.) Then section 11 makes express provision for the case of a sum of money becoming payable on the death of a member; and there are other sections which I think tend to the same conclusion. I think, therefore, the word "business," is used in the limited sense of *trade, commerce, traffic*, and that so life insurance, confined to the members of the association, is not a purpose excluded from the Act by the exception; *Bramwell v. Lacy*, 10 Ch. D. 691.

The next question is, whether it is included within the purposes of the Act as being either a benevolent or provident purpose, and I am of opinion that it is. Life insurance is a method of providing for the future, and if it be not within the Act, I do not know what provident purpose could be. It is defined to be a contract whereby a sum of money is secured to be paid upon the death of the person whose life is assured: Wharton's Law Lexicon. It seems to me to be within the very words of the Act as an association for a provident purpose.

I think, therefore, that if the defendants are what the statement of claim alleges, an insurance company carrying on business at the city of St. Thomas, and incorporated under R. S. O., ch. 167, the meaning of that is, that they are an association of persons incorporated under that Act for the provident purpose of mutual life insurance; and that it is not improper to describe them as a company, nor to speak of their carrying on business, nor to describe the certificate or instrument manifesting the plaintiff's right to his insurance merely as a policy.

The next question is, whether the Act to secure to wives

and children the benefit of assurances on the lives of their husbands and parents, is applicable to such an insurance as the present.

Judgment.
MACLENNAN
J.A.

The Act which was in force when this insurance was effected, as alleged in the statement of claim—viz., on the 21st of August, 1886, was the Act of 1884, 47 Vic. ch. 20, for that Act had repealed and consolidated the previous legislation on the subject. Section 1 declares that the Act shall apply to every lawful contract of insurance now in force or hereafter effected, which is based on the expectation of human life; and shall include life insurance on the endowment plan as well as every other.

The operative words here are “insurance based on the expectation of human life,” including life insurance on the endowment plan as well as every other.

I think the words “insurance based on the expectation of human life,” just mean *life insurance*, as distinguished from other kinds of insurance, such as fire, marine, accident, &c. The words may not be very apt, but what is intended and meant is, that the premium is based on the probable duration of human life. But all uncertainty is removed when the clause goes on to say that it includes life insurance on the endowment plan as well as on every other plan. So that the Act applies to every kind of life insurance.

That being so, it must apply to the case in hand, that of a provident company associated under the Act referred to for mutual insurance; and I think the statement of claim shews that this policy was made by the assured for the benefit of his child as authorized by the third section of the Act.

The remaining question is, whether the present plaintiff, who was appointed a trustee for the infant child of the assured, for whose benefit the insurance was made under section 3, by an order of the High Court, dated the 28th of November, 1887, can maintain this action for the benefit of the infant.

Section 11 says that the assured may appoint a trustee

Judgment.
MACLENNAN
J.A.

of the money payable under the policy, and provide for its investment, and declares that payment to the trustee shall discharge the company.

Section 12 provides that when no trustee has been appointed by the assured, the money may be paid to the executor of the assured, or to a guardian for the infant appointed by the Surrogate Court or the High Court ; or to a trustee appointed by the High Court, and that such payment shall discharge the company.

And then section 13 provides that the trustee, executor, or guardian may invest the money received as therein directed, and may from time to time alter, vary, and transfer the investments.

It is contended for the defendants that these provisions are intended for the relief and security of the companies in paying claims, and it is very likely that was the main purpose of the sections. But the Legislature has gone far beyond what was necessary for that one purpose. It has provided for the appointment of a trustee of the money payable under the policy. He is spoken of as a trustee to receive the money, and he is authorized to invest it when received, and to alter, vary, and transfer the investments. Now, while it is true that the money is the money of the infant, and that a trustee might sue for it in the name of the infant, and might also invest in the name of the infant, and although there are no express words authorizing the trustee to sue or vesting the legal property in the money, either before or after payment, in him, yet I am of opinion that such was the intention of the Legislature, and such is the effect of the language which is used. The trustee is not spoken of as the trustee of the infant, but as the trustee of the money. It is usual and proper that the legal title or property in the subject of the trust should be in the trustee. It is that legal title or property which he holds upon trust. It is necessary that he should have the legal title in most cases to enable him to act in his trust with convenience, economy, and efficiency ; and this is so in the present case. He is authorized to invest in government

securities, or municipal debentures, or mortgages of real estate; and he may from time to time alter, vary, and transfer the investments. I think it is evident that these powers could not be exercised beneficially or conveniently without the legal title, or otherwise than in the trustee's own name; and I therefore think the Legislature intended to give the trustee a right of action, as well as a right to receive the money.

Judgment.

MACLENNAN
J.A.

The only difficulty I have had in coming to these conclusions, arises from the provisions of the Insurance Act of Ontario, first enacted in 1876, 39 Vic. ch. 23, by section 2 of which it is made unlawful under a penalty to do any insurance business without a license; and which by section 5 requires a government deposit as the condition of obtaining a license.

This Act was re-enacted in substantially the same terms in the Revised Statutes of 1877, ch. 160, and while mutual fire insurance companies are excepted from its operations, there is no exception made of mutual life companies or of provident companies.

It may, therefore, be contended that a provident life company could not insure its members by mutual contributions or assessments without a license obtained under the Insurance Act, but if not, I think we cannot assume, for the purpose of this demurrer, that the respondents were not duly licensed.

It seems, however, that upon the Insurance Act being consolidated in 1887, 50 Vic. ch. 26, it was the opinion of the Legislature that provident companies did not require a license under the former Acts, for by section 3, sub-section 2, it was enacted that the new Act should not apply to provident societies which did not require a license for any such contract before, and this exception is repeated in the revision of 1887, ch. 167, section 3, sub-section 2.

Unless I had been able to come to the conclusion that this company was a provident company duly incorporated under ch. 167, of the revise of 1877, I should have had great difficulty in holding that it came at all within sec-

Judgment. tions 1 and 2 of 51 Vic. ch. 22, for that Act is restricted
MACLENNAN in its application to societies or assurances for "fraternal,
J.A. provident, benevolent, industrial, or religious" purposes.
But finding it a life insurance company, that is sufficient
to bring it within the Act for the benefit of wives and
children without the aid of the 51 Vic. ch. 22.

I am, therefore, with great respect, of opinion that the
judgment appealed from should be reversed, and that the
demurrer to the statement of claim should be overruled
with costs.

I have had some hesitation as to the costs, for I think
the statement of claim by no means a model of good
pleading.

BURTON, J. A. :—

I think that the conclusion arrived at by the learned
Judge below was correct, and that his judgment should be
affirmed.

The original Act securing to the family of a deceased
husband the benefit of a policy effected upon his
life was, at the time of its passing in 1865, regarded
as a great innovation, and by many strongly opposed as
likely to operate unjustly to creditors; but there can be
no question that its provisions were confined strictly to
what is popularly known as "Life Assurance," in other
words a contract made with a company authorized to carry
on the business of life assurance for the payment of a
certain sum at death in consideration of an annual or
other premium based on the expectation of human life;
and it is not unimportant to remember that at first nothing
but an annual, half-yearly, or quarterly, or some other
proportionate part of an annual premium, was permitted,
although subsequent legislation, perhaps not quite consistently,
has allowed the insured to pay one premium in gross
and still avail himself of the provisions of the Act.

The fact that the debtor could derive no personal benefit
when the assurance was for the whole term, had consider-

able weight with the Legislature in making this very sweeping change in the law; and benevolent or provident associations had at that period not been called into existence in this Province.

Judgment.
BURLINGTON
J.A.

Clearly then the Act at its passing was confined to contracts of life assurance, such as I have described.

That Act has been from time to time amended, and in 1884 its provisions consolidated, but the amendments, as well as the original Act, dealt simply with life assurance policies granted by companies duly authorized to carry on the business of life assurance.

It may be noted in this connection, that previously to the Act of 1887, (50 Vic. ch. 26) no power existed except by special charter for the incorporation of companies to carry on the business of life assurance, and previously to that time any company, although duly incorporated, was prohibited under heavy penalties from making any contract of insurance until it had obtained a license and made a deposit with the Government.

It will be seen, therefore, that previously to 1887, the Legislature expressly declined to authorize any but companies duly incorporated to carry on life assurance business, and in the Joint Stock Companies Act giving power to the Lieutenant-Governor-in-Council to grant charters for any purposes or objects to which the authority of the Legislature of Ontario extends, railways and the business of insurance are expressly excepted.

Is there then anything in the Acts respecting benevolent societies to indicate that it was intended to bring them within the Act to secure to wives and children the benefit of life assurance? But before scrutinizing them, it may be well to refer to the English Acts upon which they are founded, and the decisions upon them.

The first English Act enabled any number of persons to form themselves into a society for the mutual relief and maintenance of all and every the members thereof, their wives or children, or other relations, in sickness, infancy, advanced age, widowhood, or any other natural state or

Judgment.

BURTON
J. A.

contingency whereof the occurrence is susceptible of calculation by way of average. That Act was amended by extending its provisions to nominees of members, and there was also added, "or for any other purpose which is not illegal."

The first of these Acts confined the operations of the society to its members only—and only during life—the amendment extended them to nominees, so that a member might provide for any person he was desirous of assisting in the event of sickness, &c., but it added also "or for any other purpose not illegal."

It was contended that these words permitted of life assurance, but it was held that they must be construed as other purposes, "*ejusdem generis*," that is, any other purpose connected with the provident and benevolent matters for which the society was incorporated; and it was held that though the assurance of lives was not illegal, it did not follow that these societies could grant such assurances.

Then came the 9th and 10th Vic. ch. 27, which extended the powers in these words:

"For the lawful insurance of money to be paid on the death of the members, their husbands, wives, or children, kindred, or nominees," and it was held that that did not mean an ordinary assurance on a person's life, even though the rule giving them that power had been certified and allowed by the registrar. It was held to be in one sense an insurance, because the money that they paid was like a premium paid on an ordinary life assurance, but it was held to be a very different thing from an ordinary life assurance.

The English Acts did not, as our Act does, prohibit the society from engaging in any trade or business, or incorporating for any of the purposes mentioned in the schedule, including insurance, but by judicial decision their operations were confined to the objects implied under the words "benevolent or provident purpose," which would include insurance *inter se*.

In the course of the argument in the *Queen v. Shortridge*,

I D. & L. 855, Wightman, J., asks: "How would you say as regards a society for mutual assurance from losses by fire or sea? There the purpose is equally blameless and laudable as those you are contending for. Would you say that such a society is a friendly society within the meaning of these acts?" The answer of counsel was no, such a society would have nothing of a charitable nature in its purposes, but a better answer was given by the Court in delivering judgment—viz.:

Judgment.
BURTON
J.A.

"But I think there is a more direct answer, that the Legislature has thought fit to regulate those societies (such as insurance companies) by express Acts of Parliament."

In the English Acts the objects of such associations are more minutely defined, but at the time of the passing of our Act, the scope and purpose of such societies were well understood and defined by judicial decision; as also those matters with which they had no power to deal, although not in terms prohibited by their Act of incorporation.

The Acts as originally designed, were intended to apply only to the accumulation of the small earnings of persons in humble circumstances; but the purposes and objects of such societies, though greatly extended, must nevertheless come within the definition of provident or benevolent purposes, and not extend to matters which are not strictly of that character. It is true that *ex abundanti cautela*, as I presume, our Legislature has in terms excluded trade and business and the purposes referred to in the several Acts mentioned in the schedule, but these restrictions were unnecessary.

I have already pointed out that the original Act of 1865 could not have extended to an instrument like this certificate. Where then are we to look for a change in the various Acts amending that Act, which would have the effect of extending its operation to it? The contracts referred to in that Act and the several amendments, are what are described in the Ontario Insurance Act as contracts effected by any corporations (except benevolent, provident, industrial, or co-operative associations) which are author-

Judgment.

BURTON

J.A.

ized to grant assurances and hold a license for the purpose ; in other words, commercial contracts of assurance, and there is nothing in the Benevolent Societies Acts from which an inference can be drawn that it was intended to include their certificates within it. On the contrary the Acts contain internal evidence of the most conclusive kind, as it seems to me, that they were not intended, previously to 1888, to be included.

Any Act depriving a creditor of a right previously enjoyed would have to be expressed in very clear terms.

Now so far from the Act, chapter 136, which absolutely exempts the proceeds of a policy effected under its provisions, being made to apply to benefits of any kind under the Benevolent Acts, the exemption under the latter Acts was confined at first to \$500, and under the recent Act to \$2,000.

If in a case arising before the passing of the Act of 1888, the money payable to a member exceeded \$2000, what possible answer could be urged against the claim of a creditor who had attached the excess? I confess I can see none.

In a case recently decided in England the learned Judge who delivered the judgment of the Court uses this language :

“ We have arrived at this conclusion with some difficulty, though without doubt. The difficulty has arisen not from anything inherent in the subject itself, which is simple enough, and might be quite simply treated ; but from the mode of legislation now usual in these matters. Sometimes whole Acts of Parliament, sometimes groups of clauses of Acts of Parliament, entirely or partially, sometimes portions of clauses are incorporated into later Acts, so that the interpreter has to keep under his eye, or, if he can, to bear in his mind, large masses of by-gone and not always consistent legislation in order to gather the meaning of recent legislation. There is very often the further provision that these earlier statutes are incorporated only so far as they are not inconsistent with the statute into which they are incorporated ; so that you have first to ascertain

the meaning of a statute by reference to other statutes, and then to ascertain whether the earlier Acts qualify only or absolutely contradict the later ones, a task sometimes of great difficulty, always of great labour—a difficulty and labour, generally speaking, wholly unnecessary. It has, indeed, been suggested that to legislate in this fashion, keeping Parliament, in truth, in ignorance of what it is about, is the only way in which at the present day legislation is possible. We know not whether the suggestion is correct; what we do know is that this procedure makes the interpretation of modern Acts of Parliament a very difficult and sometimes a doubtful matter.”

Judgment.

 BURTON
J.A.

I am afraid these remarks are not wholly inapplicable sometimes to our own Legislature, although we experience no difficulty of the nature described in this case.

I think the Act of 1865 and its amendments as they stand now consolidated, applied only to contracts of life assurance properly so called, and that the benefits to members of provident or benevolent societies, whether in regard to payments *inter vivos*, or as a species of mutual assurance, were not within the contemplation of the Legislature when passing that Act.

The remarks which I have quoted, though inapplicable in reference to our own Legislature previous to the Act of 1888, may perhaps not be out of place as applied to it. It may be found that the machinery applicable to a totally different condition of things, may be difficult to work out in connection with these benefits under an Act passed as I have pointed out for purely charitable objects, and I should have thought a simpler solution would have been to strike out the limitation of \$2,000 and extend the exemption to the full amount of the moneys payable to the member or his nominee.

I am free to confess that a complete change has been effected by the Act of 1888, and I must not be supposed as being in any way unfavourable to the object intended to be attained by that legislation. If it was proper to exempt from the claims of creditors the proceeds of ordinary

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J. A.

life policies, the argument in favour of such exemption applies even to a greater degree to savings of this nature.

That Act undoubtedly brings assurance of this kind then existing or thereafter to be issued within the provisions of chapter 136, but when the Legislature in addition to so declaring proceeds to interpret and place a construction upon the law as it existed before its passing, whilst giving to that interpretation the most respectful consideration and all the weight to which it is undoubtedly entitled, I am quite unable to agree with it. I feel that no greater weight can be attributed to it than that of any of our learned brothers, whose judgments, in the course of our judicial duties, we are called upon to review. After giving the matter my most earnest consideration, and with a desire if possible to decide in favour of the beneficiary in this case, I am compelled to hold that we would not be warranted in placing any such construction upon the Act.

Without expressing any opinion as to the right of a trustee properly appointed to sue, it is sufficient to say that a receipt of such a trustee would be a sufficient discharge; but as in my view the construction contended for is not the true one, the trustee appointed in this case before the Act of 1888 was passed, is simply void, and I think the company were rightly advised that a payment to him would be no discharge, but would leave them exposed to an action at the suit of the infant, in the event of misapplication, or the failure of the investments in which the money might be placed.

Appeal allowed with costs, BURTON, J. A., dissenting.

GRANT v. THE PEOPLE'S LOAN AND DEPOSIT COMPANY.

Contract—Interest post diem—Damages.

THIS was an appeal by the defendants from the judgment Statement.
of GALT, C. J., and came on to be heard before this Court
(HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, J. J. A.)
on the 10th of February, 1890.

Delamere, for the appellants.

Beck, for the respondents.

The action was one for redemption, and the chief question involved in the appeal was the construction of the following proviso for payment contained in the mortgage in respect of which the action was brought: "Provided this mortgage to be void on payment *** of \$7,500 * * * on or before the 1st day of June, 1884, with interest thereon at the rate of ten per cent. per annum, until such principal money and interest shall be fully paid and satisfied."

The defendants were allowed by the Referee interest after the 1st of June, 1884, as damages, at the rate of six per cent, and this ruling was affirmed by GALT, C. J.

At the conclusion of the argument this COURT delivered Judgment.
judgment affirming the judgment of GALT, C. J., being of opinion that the case was not distinguishable from *Powell v. Peck*, 15 A. R. 138, and *St. John v. Rykert*, 10 S. C. R. 278.

MCARTHUR V. THE NORTHERN AND PACIFIC JUNCTION RAILWAY COMPANY ET AL.

Railways—Constitutional Law—Limitation of Action—R. S. C. ch. 109, sec. 27—Timber Licenses—Intervals between Licenses—Trespass—Continuing Damage—R. S. O. (1887) ch. 28.

The defendants, a railway company incorporated by an Act of the Parliament of Canada and subject to the provisions (among other provisions) of section 27 of the Railway Act of Canada, built their road through lands in the Province of Ontario, the fee of which was in the Crown but over which the plaintiffs had for three successive years held timber licenses issued by the Provincial Government. These licenses, giving the right to cut timber and exclusive possession in the usual form, were dated respectively the 5th of July, 1883, the 10th of December, 1884, and the 22nd of July, 1885, and each extended from its date to the 30th of the next April. The defendants entered upon the limits in question about the end of the year 1884 and the road was completed in July, 1886. In building the road the defendants cut down timber on the line and also both within and outside of the six rod belts mentioned in the statute. No timber was cut after December, 1885. The plaintiffs brought this action on the 9th of September, 1883, to recover damages for the timber cut. It was admitted that as to timber cut outside the six rod belts they were entitled to recover, but it was contended that as to timber cut on the line and within those belts the action was barred. The defendants had filed their plan and book of reference but they had not taken any of the statutory steps to acquire the interest of the plaintiffs.

Held—Per HAGARTY, C. J. O., and OSLER, J. A. That the damage to the timber on the line and within the six rod belts was damage “sustained by reason of the railway” within the meaning of section 27 of R. S. C. 109, and that that section was *intra vires* the Dominion Parliament. That the plaintiffs were entitled to damages for the illegal occupation of the limits and as consequent thereon to damages for all injury done during the illegal occupation; but that the plaintiffs had no title to the limits sufficient to maintain an action, either on legal or equitable principles, in the intervals between the licenses. That, therefore, the right of action was barred except as to damages sustained during the currency of the last license, but was saved as to those by virtue of the occupation being illegal up to the 30th of April, 1886, less than six months before action.

Per BURTON, J. A., and MACLENNAN, J. A. That the section was *ultra vires* the Dominion Parliament as being an unnecessary interference with property and civil rights within the Province, but that even if valid would not avail for the protection of the defendants as they were mere trespassers.

Per MACLENNAN, J. A. That even if the section were valid and applied the plaintiffs were entitled to recover all the damages, the trespass having been a continuous uninterrupted one and the plaintiffs’ right of renewal of their licenses being sufficient to enable them to recover notwithstanding the intervals between them.

Statement.

THIS was an appeal by the plaintiffs from the judgment of STREET, J., reported 15 O. R. 733.

The facts are stated in the judgments.

The appeal came on to be heard before this Court *Statement.*
(HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A.)
on the 1st of February, and 6th of March, 1889.

W. Nesbitt, and *A. W. Aytoun-Finlay*, for the appellants.
S. H. Blake, Q. C., and *E. Martin*, Q. C., for the respondents.

Irving, Q. C., for the Attorney-General for Ontario.

January 14th, 1890. HAGARTY, C. J. O. :—

The statement of claim avers that the plaintiffs are lumber merchants, and that the defendants are a railway company incorporated by Act of the Dominion Parliament, and that they have been for several years past engaged in the construction of a railway from Gravenhurst through Muskoka, &c., to the east shore of Lake Nipissing, and thence through Algoma to Sault Ste. Marie, &c., and that the defendants, Hendrie & Co., are railway contractors ; that the plaintiffs held timber licenses under the Government of Ontario, and were entitled to take the timber from, and occupy, the limits included in these licenses to the exclusion of all others ; that in the autumn of 1884 the defendants entered on the limits and cut down and removed timber, and so continued to do for about a year, and laid out and constructed a line of railway through a portion of the limits and laid rails thereon, and that the defendants wrongfully broke and entered upon the said limits and deprived the plaintiffs of the use thereof.

The railway company defends, "By statute—Consolidated Railway Act, 1879, sec. 27. Public Act."

The defendants Hendrie & Co. in their defence say that they were contractors under the railway company who represented to them that they had obtained the authority and consent of the Government of Ontario, and of all others, (if any), whose consent was required, to enter upon the said lands and they claim to be indemnified by the company.

Judgment.

HAGARTY
C.J.O.

Issue is taken by the plaintiffs.

It was admitted for the purposes of the trial that the company had duly filed their plans, &c., under the Railway Act.

No cutting or conversion took place after December, 1885. The railway was completed in, and has been running since, July, 1886. The action was commenced on September 9th, 1886. It was agreed to refer to a referee the question of damage, if the defendants were liable, they contending they were not liable under the six months' limitation.

There was also to be a reference as to timber cut outside the track and belts.

It appears from the judgment of the learned Judge that the defendants entered on the land held by the plaintiffs under license in the Autumn of 1884, and that they built the railroad and cut down and used timber on the line, and for a great distance on both sides of it, both within and outside the six rods belt.

None of the trespasses were committed within six months of the bringing the action.

The learned Judge held that the six months' limit was a bar to everything done on the line and within the six rods belt.

He notices an objection taken by the plaintiffs that the defendants did not shew any order or consent of the Ontario Government authorizing them to enter on the land, and that, therefore, they could not set up that the damage was done by reason of the railway.

He held that as it was admitted that the road had been constructed and was in actual operation under the Dominion Act before action brought, the company were entitled to the protection of the clause.

He was of opinion that the Dominion Statute was not *ultra vires*.

As to the objection that the defendants did not prove the assent of the Ontario Government to enter on these lands, it may be well to consider it in the first instance, assuming that such leave was necessary.

The defendants are sued as a railway company under a Dominion charter, who have entered on this land, laid their railway, and cut timber, etc.

Judgment.

HAGARTY
C.J.O.

The plans, etc., were filed in June, 1885. All the cutting, it is admitted, was before December, 1885. The road was completed and in running order in July, 1886, and the action brought in September, 1886.

It seems to me that at the trial of this action this company were not bound to prove the assent of Ontario. No proof had been offered that such assent had not been granted. It was said, I think, by counsel on the argument before us, that there was no such assent, but the presence of counsel for the Ontario Government before us, under the statute, R. S. O. ch. 44, sec. 55, was for the purpose of arguing questions as to "the constitutional validity of any Act of the Parliament of Canada, or of the Legislature of Ontario," and upon such questions the Minister of Justice or the Attorney-General may be heard, "notwithstanding that the Crown is not a party to the action or proceeding."

Therefore the question before us in which either of the Governments was concerned, was not whether such an assent had or had not been given, or whether or no the entry of the railway company was legal or illegal; it was only the validity of the enactment or any clause thereof that was in question.

It seems to me that on the trial of such a case as this, it was not necessary for the defendants to prove the assent. It might be different if the plaintiffs had thought proper to prove as part of their charge of illegal entry that the Ontario Government had not given its assent. A Court trying this case, with a chartered railway in full operation before action brought, with the plans duly filed, &c., might, I think, in the absence of any proof to the contrary, or that the Ontario Government had ever objected or interfered, assume that the railway was lawfully on this land—at all events until the contrary was proved. It could hardly be imagined that the Ontario Government would have allowed the building of a railway running through great sections

Judgment. of their ungranted lands, without action on their part to
HAGARTY restrain. See on this point the late case in the Privy
C.J.O. Council, *North Shore R. W. Co. v. Pion*, 14 App. Cas. at
p. 630.

I do not think that there is any difference of opinion in this Court as to the right of persons in the plaintiffs' position, as licensees of the Crown, to receive compensation from any railway company entering on the land or taking the timber.

The practical difficulty arises in the learned trial Judge holding that the claim is barred as to all injuries on the line or within the six rod belt by the lapse of six months.

The Dominion Railway Act, R. S. C. ch. 109, sec. 27, enacts that all actions or suits for indemnity for any damage or injury sustained by reason of the railway shall be commenced within six months next after the time when such supposed damage is sustained, or if there is continuation of damage, within six months next after the doing or committing of such damage ceases.

By a Dominion statute in 1888, after this action was commenced, the limitation was extended to twelve months.

On this limitation clause two questions are raised. 1st. That the trespass and injuries complained of were not within the statute as not being occasioned by reason of the railway. 2nd. The much wider question that such a limitation was *ultra vires* the Dominion Parliament who cannot prescribe any such interference with civil rights. If the first of these objections prevail, it will be unnecessary to enter on the larger question.

This limitation clause had been the law of the land before Confederation, and is continued and re-enacted in the General Railway Act of Ontario, R. S. O. (1877) ch. 165, sec. 34, professing to follow *verbatim* the like clause of C. S. C. ch. 66, sec. 86. This Act, and the last Act in 1887, professes to apply to railways under the legislative authority of the Ontario Legislature, and those authorized by Acts of the late Province of Canada since the 30th of August, 1851.

C. S. C. ch. 66, professes to apply to all railways authorized under Acts passed since 1851, and under any Act passed after that statute, and section 86 prescribes the six months' limitation. All this was before Confederation. Then our Ontario Legislature, in their Railway Act in 1877, adopts this clause *verbatim*, citing it as from the C. S. C. ch. 66.

By the British North America Act, section 129, it is provided that all laws in force in Canada, &c., shall continue as if the Union had not been made, subject to be repealed, &c.

We thus find the six months' limitation as always existing and merely re-enacted by our Local Legislature as to all railways over which they had authority. We are not dealing with a case where the Provincial Legislature altered by statute an existing law of Canada, so far as it operates in Ontario. See *Dobie v. Temporalities Board*, 7 App. Cas. 136.

When, therefore, we find the Dominion Act using the same words as to the six months' limitation as appear in the Consolidated Statutes of Canada and also in the Ontario Acts, we should regard them as simply conforming to the law as existing in Ontario applicable to railways, and not as adopting some new limitation or bar to the rights of parties. If the Dominion Act had said: "subject to the same limitation as to bringing actions for indemnity, as prevails in Ontario," it could hardly be said that there was any attempt at interference with the local laws.

I decline discussing any extreme case that may be suggested, such as a total bar to all actions for indemnity. It will be time enough to consider such cases when we find the attempt made to curtail rights beyond the present known limit.

Some doubts were expressed as to whether the injuries here complained of as to cutting down and converting the plaintiffs' timber, fall within the words "damage or injury sustained by reason of the railway," as they were in fact done before the railway as such was in existence. The concluding words of the enacting section throw light upon the meaning—the defendants may give the Act and the

Judgment.

HAGARTY
C.J.O.

Judgment.
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C.J.O.

special Act in evidence "and may prove that the same was done in pursuance of and by authority of this Act and the special Act."

These words seem to me very like those used in some of the older Railway Acts: "if any action be brought for any matter or thing done in pursuance of this Act," then the six months' limitation. In *Follis v. Port Hope &c. R. W. Co.*, 9 C. P. 50, there was this special clause and also the general one under 14-15 Vict. ch. 51, "by reason of the railway."

It was there considered that the plaintiff could recover for timber taken before the railroad was made, but the case went off on other grounds.

Roberts v. Great Western R. W. Co., 13 U. C. R. 615, was an action for injury to a passenger. Sir John Robinson says that the clauses relied on by plaintiff, as to damages by reason of the railway, only apply to actions for damages occasioned by the company, "in the exercise of the powers given, or assumed by them to be given, for enabling them to construct and maintain the railway."

The case arose on demurrer to the claim based on 16 Vic. ch. 99, sec. 10, which is the same as that now in force: "by reason of the railway."

In *Browne v. Brockville and Ottawa R. W. Co.*, 20 U. C. R. 202, Sir John Robinson refers to the language of some of the English Railway Acts: "no action shall be brought for anything done or omitted to be done in pursuance of this Act." He then quotes the words of our Act: "sustained by reason of the railway," and adds: "it appears to us that our statute is in its effect as comprehensive as the English, though the forms of expression used are very different."

I cannot concur in the opinion that because the company entered without proceeding to assess and pay compensation they are necessarily barred from the protection of the six months' clause. It is unfortunate that the objection first raised in the reasons of appeal was not taken at the trial and there decided on the evidence. If

it be intended to insist that the company did enter and make the railway on some other ground and for some other purpose, merely using the statute as a cloak or pretext to effect some other object, such an objection should have been urged and tried as a question of fact.

Judgment.

HAGARTY
C.J.O.

So far from such a question being raised we find in the admissions that the defendants filed in the proper office the usual plan and book of reference required under the Railway Act as a condition precedent to expropriate lands, that the railway was completed and running before the action was brought, that timber was cut on the right of way during the course of construction and for the purpose of the construction of the railway, and that trees were felled under section 6, clause 12, of the Railway Act.

These admissions form in fact the whole of the evidence. The statement of claim sets out the purpose of the defendants' incorporation, and that they entered on the lands, cut the timber on the line of railway and on both sides and constructed the line of railway on the lands. The plaintiffs say in effect that they are suing the defendants for what they did to make the railway under their charter.

I am wholly unable to understand how I, as an appellate Judge, can be properly asked to hold that it is open to me to enquire whether the company did *bonâ fide* enter and cut under the statute or otherwise.

It is admitted, I think, beyond question, that they did enter after filing plans, and did cut down the timber for the purpose of the construction of the railway, and did complete it and open it for use before suit.

I cannot see how I can add to this that they acted in that manner *alio intuitu*, and in bad faith. There is no ground for suspecting even that the entry was made for any other purpose than to make the road. If I might indulge in conjecture, I would say that they, finding no one in visible occupation, treated the lands as ungranted lands of the Crown in a state of nature.

I think that the limitation of action clauses are fully applicable to a case like the present—the limitation was to

Judgment. meet cases of error or mistake. No protection is needed
HAGARTY where a company has proceeded regularly.
C. J. O.

The only direct authorities I have seen are *Boothby v. Morton*, 3 B. & B. 239 ; *Oakley v. Kensington Canal Co.*, 5 B. & Ad. 138.

The first of these was in 1822. The action was against the commissioners under a Drainage Act, for digging a ditch and throwing soil on the defendant's land. It was brought over six months after the act complained of. The Act provided that all actions against the commissioners should be brought within six months and not afterwards. They were allowed to expropriate lands on payment of compensation, and upon payment of the compensation they had authority to enter and use the lands.

It was objected for the plaintiff that the payment of compensation was a condition precedent to the claiming of any protection under the Act. Best, C. J., nonsuited, and the Court on motion refused a rule, saying that the Act contained nothing which afforded any ground for supposing that even if the provisions pressed on their notice had not been complied with the action against the commissioners could therefore be brought at any unlimited time.

The other case was decided in 1833. There was the six months' limitation clause and a provision that no garden ground, &c., should be taken without the consent of the owners. The company entered and did their work by a false representation to the plaintiff's tenant that the landlord's assent had been obtained. After the expiration of the six months the action was brought. The Court held it was barred. Lord Denman said that the limitation was a beneficial one and should be adhered to, that the words "anything done in pursuance of this Act, or in execution of the powers," etc., must be taken to mean something done in the prosecution of the works contemplated and not merely making the Act a colour ; that the conduct of the company could not be approved of but that the action was too late.

Littledale, J. : "The defendants are entitled to protection although they have exceeded their authority."

Patteson, J., agreed.

Lord Wensleydale, (then Sir J. Parke) said : "The words apply to all cases where the parties are intending to act upon powers given by the statute and not merely using it as a cloak for their own private purposes. Although the defendants here misrepresented facts to the tenant, that makes no difference in the application of the clause."

I cannot find any trace of either of these cases being overruled or questioned. I am prepared to be governed by them.

The road was incorporated by an Act of the Dominion Parliament in May, 1881, 44 Vic. ch. 45, reciting that the intention was to build an independent line of railway from Gravenhurst, where the Northern Railway terminated, to Callendar station on the Canadian Pacific Railway, and thence to Sault Ste. Marie ; to bridge that river, and connect the railway system of Canada with that of the North-Western States, and that the road would be for the general benefit of the Dominion. The Act contained provisions for arranging with the State of Michigan respecting the proposed bridge.

The powers conferred by the General Railway Act of 1879 are given to this company. By an Act of 1883, 46 Vic. ch. 67, the name was changed. Further amendments were made by an Act of 1886, 49 Vic. ch. 76. It recited that the Dominion had advanced \$12,000 per mile in aid of the railway.

If it be necessary to decide the point expressly, I am bound to say that I think the Dominion Parliament had the right to enact any reasonable limitation of the right of action for injuries.

The subject matter of this charter, viz. : the construction of a railway declared from the beginning to be for the general benefit of Canada, was, as I think, wholly within the scope of Dominion legislation, and consequently wholly

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without the range of Provincial enactment as emphatically as bankruptcy and insolvency or bills and notes : *Valin v. Langlois*, 5 App. Cas. 115.

The carrying into execution the powers granted by the charter necessarily trenched largely on what are called civil rights—the taking of land &c., must do so.

The language of the Privy Council in disposing of the objection taken that insolvency legislation trenched on civil rights has been often quoted and is fully applicable here : *Cushing v. Dupuy*, 5 App. Cas. 409.

“Procedure must necessarily form an essential part of any law dealing with insolvency. It is therefore to be presumed, indeed, it is a necessary implication, that the Imperial Statute, in assigning to the Dominion Parliament the subject of bankruptcy and insolvency, intended to confer on it legislative powers to interfere with property, civil rights, and procedure, within the Province, so far as a general law relating to these subjects might affect them.”

These words, I think, apply to every class of subjects assigned to Dominion legislation. The present case falls within the words “such works as, although wholly situate within the Province, are *before or after* their execution declared by the Parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the Provinces.”

The expropriation of land deals largely with procedure, fixing time, place, and manner of dealing with the civil rights of owners, and numerous provisions are necessarily to be found to work out the system common to most railway creations.

I think a limitation based on the almost universal course of legislation in Canada cannot be justly held to be without the powers of the charterers. The right to pass such an Act as this to incorporate a railway to run through properties in Ontario has not been impugned. We find our Local Legislature in 1877, and again in 1887, in its General Railway Acts, specially inserting provisions giving powers to arbitrators valuing lands taken by a rail-

way either under the Act in question "or any Railway Act of the Dominion."

Judgment.

HAGARTY
C.J.O.

I consider, in short, that this railway was a work as essentially and exclusively a subject for Dominion legislation as Insolvency, Bills or Notes, &c.

The plaintiffs obtained the usual timber license dated 5th of July, 1883, to hold and occupy from that date to the 30th of April, 1884, and no longer, with the condition that all persons may at all times make and use roads upon, and travel over, the ground hereby licensed. Then come conditions as to complying with regulations established by order in Council as to measurements, &c., otherwise the timber to be forfeited to the Crown.

Another license is proved in the same printed form, dated 10th of December, 1884, to hold from that day until the 30th of April, 1885, and no longer.

A third license is proved in the same form, dated the 22nd of July, 1885, to hold from that date to the 30th of April, 1886, and no longer.

Each license states the amount payable thereunder:—"ground rent, \$2."

The Act under which they are issued allows the issue of licenses for twelve months and no longer, subject to the regulations, &c., established by order in Council: R. S. O. (1877) ch. 26. The license shall confer for the time being the right of exclusive possession to the lands described and to timber cut during the term, provision being made for certain returns at the expiration of the license on pain of forfeiture of timber, &c.

The Crown Land regulations contain many provisions:—The limits shall be offered for sale by public auction at an upset price based on valuation, and shall be sold to the highest bidder for cash at time of sale. License holders who have complied with all existing regulations shall be entitled to have their licenses renewed on application to the commissioner or agent. Timber cut in limits for which a license has been suspended or held in abeyance, shall be considered to have been cut without authority and

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treated accordingly. Renewals must be applied for and issued before the 1st of July following the 30th of April, (the date of expiration of the last preceding license,) in default whereof the right to renewal shall cease and be treated as forfeited. No renewal shall be granted until all dues, &c., are paid.

It is alleged by the plaintiffs that the defendants entered on the limits in the autumn of 1884, and built the railway, and cut down the timber, &c. It was admitted that none of the trespasses complained of took place at a date later than December, 1885. It appears that from the 30th of April, 1884, when the first license expired, to the 10th of December, 1884, no license was in existence. It was during this interval that the first wrongful entry by the defendants took place. Then from the 30th of April, 1885, to the 22nd of July, a like interval took place. The last license expired in April, 1886, and the action was brought on the 9th of September following.

On the argument of this case we had not the advantage of hearing from counsel any discussion as to whether we should hold the plaintiffs entitled to the exclusive possession of these limits from the granting of the first license to the expiration of the last, or whether their title was limited to the time expressly covered by each license; nor was reference made to the cases bearing on the point.

The chief importance of this question is as to the application of the six months' limitation clause, and also as to whether the wrongful entry and continuing occupation by the railway drew with it the whole claim for damage to the timber, thus avoiding the necessity of suing in six months. We have heard next to nothing, if not absolutely nothing, on this.

If the plaintiffs cannot be considered as legally in possession during the long intervals between the licenses, all claim for damages, either to realty or personalty, would, in my view, be barred after six months from the termination of their title under the license.

Graham v. Heenan, 20 C. P. 340. The headnote gives

the substance: "Where the plaintiff entered on lands of the Crown, in the summer months, without any right of occupation, and no one hindering him, cut and cured hay, but was prevented from moving it by defendant who subsequently took possession, under colour of a timber license which, however, was only in force during the winter months, *Held*, that the plaintiff had no right of action against the defendant for the value of the hay so cut, the former shewing no better title than the latter."

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It was in evidence that the Crown always recognized the right of a previous licensee to have the limits licensed to him the next year. It was also shewn that the defendant held previous licenses.

The Court says: "It is not necessary to decide for any absolute right in the licensee in the intervals between each successive license. I only refer to it as rebutting any presumption in favour of the plaintiff being considered as in possession, and defendant as a mere wrongdoer."

The case shewed that the plaintiff was a mere wrongdoer, without a shadow of title, and he was defeated on the infirmity of his own title to take the hay from the defendant's custody in September.

The often cited case of *Harper v. Charlesworth*, 4 B. & C. 574, is commented on. An occupier of Crown lands paying a nominal rent to the Crown, although liable to be turned out at pleasure by the Crown, was held entitled to sue mere trespassers on the actual possession. The Crown was of course not bound in title.

In the same volume (20 C.P.) is *McDonald v. Bonfield*, p. 73. The headnote is: "The entry of a party on timber limits to cut hay, and his cutting and stacking it on the land, do not give him such property in the hay cut as to enable him to maintain trover for the removal against persons claiming by virtue of Crown licenses then in force."

The evidence is not stated. Mr. Justice Gwynne, in his judgment, quotes from the then regulations, and the right to renewal on conditions. "We may assume," he says, "that the licensee complied with these regulations,

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for by the evidence it appears that a renewal license for the same limits was issued to him on the 24th day of October, 1868." It was held that the plaintiff had no title whatever against the Crown, and that this license conferred upon the licensee "exclusive possession of the meadow upon which the hay had grown, and the exclusive right to the hay then cut and stacked thereon." His entry to take the hay was held to be under the authority of this license.

I think it clear from the judgment that the licensee's taking of this hay was subsequent to the last license.

Gilmour v. Buck, 24 C. P. 187, was replevin by a licensee for logs. The plaintiffs had for several years taken out licenses. Very full evidence was given as to the practice of the Land Department as to licenses. The logs were cut by the defendant in the winter of 1872-3. The plaintiffs' renewed license was not issued until the 5th of April, 1873, and was stated to be from the 29th of June, 1872, to expire on the 30th of April, 1873; this professed to cover the period when logs were taken by the defendant. The plaintiffs' agent had gone to mark the logs, but was forcibly prevented by the defendant, who opened a dam and floated them down a stream after the license had issued.

The trial Judge found as a fact that the plaintiffs were in possession at the time the trespass was committed although the license had not actually issued.

Judgment was given for the plaintiffs by the Court, as the latter were shewn to have been in actual possession. The preceding cases are reviewed, and the doctrine of *Harper v. Charlesworth*, 4 B. & C. 574, noticed, and the defendant's position as a mere wrongdoer considered. Nothing was decided as to the rights in the interval from the 30th of April to actual renewal.

Contois v. Bonfield, 25 C. P. 39, does not touch the point in question. The judgment of Gwynne, J., is chiefly on the peculiar point of the case, which appeared in this Court in Appeal: 27 C. P. 84. The language of Moss, C. J., may be referred to as to the licenses, and also as to the equitable

plea on which the defendant rested as licensee. The dispute was finally adjusted, and justice done, in the suit of *Attorney-General et al. v. Contois*, 25 Gr. 346.

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HAGARTY
C.J.O.

I am unable to agree that we should hold the plaintiffs' title to the limits sufficient to maintain this action, either on legal or equitable principles, in the interval between these three licenses.

If they had shewn an actual possession during the intervals, as in *Gilmour v. Buck*, 24 C. P. 187, the case might be different, but as already remarked, we have no evidence whatever except the statements in the pleadings and certain admissions.

If the Crown intended to give a right of renewal from the date of the first license to the end of the last license, each renewal could have professed to be from the expiration of the preceding. But they do not. When we talk of the equitable right of the licensee as against the Crown to obtain a renewal we are answered by the production of the so called renewal, granted and dated after an interval of months.

I think we may uphold the plaintiffs' right to have the reference varied so as to include an account of all timber taken from the date of their last license, 22nd of July, 1885, up to the end of the following December, after which time the admissions state that no timber was cut.

It is true that six months elapsed from December to the bringing of the action in September following. But the action in form charges an entry on the limits, and the placing of this road thereon, and the taking of the timber, &c. When the plaintiffs obtained their exclusive right of possession on the 22nd of July, 1885, they found the defendants trespassing on the limits and occupying them.

No notice whatever was apparently taken by the counsel either below or before us, or any stress laid on any injury to the realty or claim for damages on that head, but we must notice it, and it seems that when the claim is in the nature of *quare clausum fregit*, all damages to fences, trees, herbage, &c., may be claimed as consequent thereon.

Judgment.

HAGARTY
C.J.O.

In this view the statutable limitation would not seem to apply, as the illegal occupation of the plaintiffs' land continued at least to the expiration of their license in April, 1886, and the action was brought within six months therefrom.

In *Snure v. Great Western R. W. Co.*, 13 U. C. R. 376, the late Sir John Robinson commenting on the clauses as to continuing damage, says: "The effect of this is to save the right of action for the whole damage, where the suit is brought within six months after the injury has ceased, and of course the action is saved as to all the damage so long as the injury continues."

Draper, C. J., refers to this decision in *Patterson v. Great Western R. W. Co.*, 8 C. P. 89.

I think the decree of the learned trial Judge must be varied, as indicated, so as to direct an inquiry into all damages from the 22nd of July to the 30th of April following.

BURTON, J. A. :—

The defendants, the railway company, are incorporated under an Act of the Dominion Parliament, and derive whatever powers they are entitled to exercise, under it and some amendments to it.

They have not sought for nor obtained any powers from the Legislature of the Province, and the acts complained of were, as they allege, committed by them in preparing for the construction of their line of railway through lands situated in this Province.

The plaintiffs held the lands through which the defendants subsequently constructed their railway, and on which the timber in question was cut, under a license from the Ontario Government, which conferred upon them the right to the exclusive possession of the lands until the issue of a patent from the Crown to a purchaser, and vested in them, during its continuance, the right to the timber and trees which were cut by the defendants.

The learned Judge below has dealt with the case in three aspects :—

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J.A.

1st. As regards the trees cut upon the track proper selected by the company, and on which they have since constructed their railway.

2nd. The trees cut upon the six rod belt on either side of the track.

3rd. The trees cut beyond those two belts.

As to the last, he held the company to be trespassers, and ordered a reference to the County Court Judge of Lincoln to ascertain the damages, and as to the other two, he held the action barred, not having been brought within six months as provided by section 27 of the General Railway Act of the Dominion.

The point mainly argued before us was as to the power of the Dominion Parliament to limit the time for bringing actions in this Province in respect to trespasses of the nature complained of—the ordinary limitation being six years:

Assuming for the present that this section of the Act of Parliament is within the power of the Dominion, and that the construction placed by my learned brothers upon section 27 be correct, then these plaintiffs are wholly without remedy for the timber cut over a strip of between four and five miles in length and 297 feet in width, the six months' limitation having run before the commencement of the action.

Some of the trees were alleged to have been cut in 1884, and the plan or map and book of reference required by the sub-sections of section 8 of the Railway Act (Dominion), were filed in June, 1885, but I understand it to be conceded that the trespasses in question were after that date, and the last cutting was not later than December, 1885, and the action was commenced in September, 1886.

No offer of compensation or readiness to arbitrate was ever made or given as provided by the Act. The acts were therefore wholly unwarranted and illegal.

Now it is almost elementary law that the act or acts for

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which compensation may be claimed must be done in the lawful exercise of the statutory powers of the company : *Imperial Gas Light and Coke Co. v. Broadbent*, 7 H. L. C. 600 ; *Ricket v. The Metropolitan R. W. Co.*, L. R. 2 H. L. 175.

For anything done in excess of their powers or contrary to what the Legislature in conferring those powers has commanded, the proper remedy is an action : *Brine v. Great Western R. W. Co.*, 2 B. & S. 402 ; *Cator v. The Lewisham Board*, 5 B. & S. 115.

It follows, therefore, that if the acts amount to trespass, the owner of the property cannot come to the Court for a mandamus to assess compensation.

After notice to treat matters are in a different position, and it is important to bear in mind that there is a very material distinction between our Act and the English Acts. A notice to treat there, when once given cannot be revoked—there is no *locus penitentie*—with us it is different. At any time before the award is finally made, the company can desist,—paying the costs. So that even in England, although the giving of the notice to a certain extent, and for certain purposes, creates the relative situation of vendor and purchaser, the giving it does not itself constitute a contract, nor entitle the company to a specific performance : *Haynes v. Haynes*, 1 Dr. & Sm. 426 ; and see *In re Marylebone Improvement Act*, L. R. 12 Eq. 389 ; but a verbal assent on the part of the owner, and an agreement as to the price, is sufficient notwithstanding the requirements of the Statute of Frauds.

The owner can, of course, obtain an injunction, and the Court on a motion to dissolve will usually refuse to interfere unless the company consent to put the matter in train for compensation ; but it is only in such or similar cases that the Court will interfere.

After notice the owner may either remain passive, treating the company as trespassers if they enter before the award is made and compensation paid, or he may compel them to proceed to arbitration.

The admissions do not shew when the plaintiffs first became aware that their property was being despoiled, and when they brought their action they are met with the statute of limitations.

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J.A.

The words of the 27th section are peculiar to the legislation of the Dominion and Province. I thought, at first, that they were imported from the adjoining States, but I have been unable to find similar enactments there.

The language I refer to, "All actions or suits for indemnity for any damage or injury sustained by reason of the railway shall be instituted within six months," has come up from time to time for judicial interpretation, and has given rise to great diversity of opinion, and expressions not material to the decision of the case then in review have occasionally been made perhaps without sufficient consideration. I should certainly, if that had been the point calling for decision, have been more guarded and precise in the language I used in *Kelly v. Ottawa Street R. W. Co.*, 3 A. R. 616, where most of the decisions were reviewed, where I refer, in one portion of my judgment, to works of preparation as well as construction; but reading the whole of the judgment together it is clear that I understood the section then, as I do still, to refer, at most, to injuries or damages arising from the actual construction of the railway, where the company or its agents were acting in the *bond fide* belief that they were properly exercising their powers, but were in point of fact exceeding them or doing the work unskilfully, and not to cases where the railway itself had no existence, and the acts complained of were not, and could not, be supposed to be done in the construction of the railway, but were purely acts of trespass, without the slightest pretence of justification.

It is unnecessary in this case to consider whether the Courts were correct or not in holding the section to apply after the railway was constructed, to acts of negligence in the management of it; such as omitting to sound the whistle or ring the bell on approaching a crossing, or in injury to

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cattle, or in allowing sparks to escape from the locomotive, where it might in a sense be said that the injury was caused by reason of the railway although it would be more accurate to say that it was caused by the negligence of the persons who were managing the trains, but this is a very different case, and the question is not whether under such language as is to be found in some of the English cases, such for instance as *Garton v. The Great Western R. W. Co.*, E. B. & E. 837, the limitation would apply, but whether the words of our own Act, "by reason of the railway," can be made to extend to acts of this nature where the railway had no existence, and might possibly never be brought into existence.

Mr. Justice Patterson in the course of his judgment in *Kelly v. Ottawa Street R. W. Co.*, 3 A. R. 616, referring to this difference, says : "The substituted phrase is, in one direction at all events, more comprehensive than the original, as it is capable of extending to many occurrences which are not done or omitted in pursuance of the statute, while in the other direction it is easy to perceive that some things done or omitted in pursuance or by authority of the Act, could not, with strict precision, be said to be by reason of the railway ; such, for example, as works of preparation and construction, which must be in progress for a long time before they result in the formation of a railway."

It would certainly be a very wide construction to place upon the words which the Legislature has thought proper to use to hold that they included acts of this kind, although in point of fact a single foot of the railway was not then and might never be built. The case of *Follis v. Port Hope &c. R. W. Co.*, 9 C. P. 50, would seem at first sight to give some colour to such an interpretation, but when examined it will be found to be no authority for it, having, as I read it, been decided under a differently worded section, although at the time of the decision, but after the committing of the trespass, a clause similar to the one we are now discussing had been introduced by amendment, so that

the Act as amended contained two limitation clauses : one similar to the present, and another providing in general terms that if any action or suit should be brought against any person or persons for any matter or thing done in pursuance of the Act, it should be brought within six months.

The Court there held that under the pleading as framed the plaintiff was confined to proof of one act of trespass, and as that act was done under the original statute, it was met, if not by the reference which had been entered into but not proceeded with, at all events by the limitation as to time to be found in that statute.

But assuming that the words "by reason of the railway" could be treated as synonymous with the words usually to be found in the English Acts "in exercise of the powers of the company," which no doubt would extend to all persons acting under or in pursuance of those powers although in excess of them, and to all persons having a *bond fide* belief in the existence of a state of facts, which if they had existed, would have afforded a defence to the action, although they had proceeded illegally or exceeded their jurisdiction, still the defendants here have failed to bring themselves within those classes of cases.

Protection clauses of this nature are intended for the benefit of those who want to act rightly and have by mistake done wrong. "The object," says Lord Ellenborough, in *Theobald v. Crickmore*, 1 B. & Ald. at p. 229, "clearly is to protect persons acting illegally but in supposed pursuance and with a *bond fide* intention of discharging their duty under the Act of Parliament."

The law is nowhere more clearly stated than in the judgment of that very able Judge the late Mr. Justice Willes, in *Chamberlain v. King*, L. R. 6 C. P. at p. 478, where he says : "The proper question for the jury is, whether the defendant honestly believed in the existence of a state of facts which, if it had existed, would have justified him in doing as he did." And he afterwards points out that in a case which had been cited as apparently deciding that an honest belief would be insufficient unless

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the defendant had reasonable ground for such belief, that that judgment must be read with reference to the facts of that case; and that the decision merely amounted to this: "There must be facts on which a belief could be based;" and he referred to the law being quite settled by the decisions in *Hermann v. Seneschal*, 13 C. B. N. S. 392, and *Roberts v. Orchard*, 3 H. & C. 769. See also *Kine v. Evershed*, 10 Q. B. 143; *Spooner v. Juddow*, 6 Moo. P. C. 257; *Booth v. Clive*, 10 C. B. 827; *Read v. Coker*, 13 C. B. 850; *Arnold v. Hamel*, 9 Exch. 404; *Leete v. Hart*, L. R. 3 C. P. 322; *Hughes v. Buckland*, 15 M. & W. 346.

That being then the law applicable to such a case as the present, what were the facts which, if they had existed, would have justified the defendants in entering on the land and cutting the trees?—Nothing but the tender and acceptance of the amount of compensation offered under the Act or awarded by a competent tribunal would have afforded a justification.

These defendants being *prima facie* trespassers were bound to shew a justification, the onus was upon them, and failing to prove it they were not entitled to the statutory protection.

It appears to have been assumed that it was sufficient for them to shew that the trespasses occurred more than six months before action, without giving any evidence to shew that they had an honest belief that the compensation had been offered and accepted.

The case was tried before a Judge, without a jury, upon admissions made on both sides which they deemed sufficient to make out their respective cases.

The defendants have failed to bring themselves within the protection of the Act. The facts which alone would have entitled them to do the act complained of did not exist, and the non-existence was a matter necessarily within their knowledge. On this ground, therefore, I think the appeal should be allowed, and the whole damages claimed referred.

I do not think that any of the cases referred to, with

the exception of *Boothby v. Morton*, 3 B. & B. 239, and *Oakley v. Kensington Canal Co.*, 5 B. & Ad. 138, to which I shall refer specially, conflict at all with this view of the law.

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In *Smith v. Shaw*, 10 B. & C. 277, which was an action against a dock company for the alleged negligence of their dock master in giving directions in transporting a vessel into the docks, the limitation was held to apply, as the direction was given in pursuance of the Act. It was his duty to give those directions, and if in doing what the Act made it his duty to do he acted erroneously, he came within the class of cases referred to where the statute gives a protection to persons exercising an honest but erroneous exercise of their powers.

Edge v. Parker, 8 B. & C. 697, merely decides that the right construction of the clause then in question was, "that if the defendant (an assignee of a bankrupt) does an act directed by the statute, but does it erroneously, he is protected, but if he does the act as the result of his ownership of that which was the bankrupt's property and not by the direction of the statute, that is not done in pursuance of the statute and he is responsible for it."

In *Gaby v. Wilts and Birks Canal Co.*, 3 M. & S. 580, the defendants had the right to take water from all the streams named except as to two in which they had the right during certain seasons only when the streams were overflowing. If they acted in the *bonâ fide* belief that the water was then overflowing in the streams in which they had their limited right, then the case falls within the rule I have laid down. The fact, if existing, would be a justification; the belief in its existence, if honestly entertained, entitled them to protection.

If there is no pretence or colour for the notion that the injurious act was done in execution of the statute under which the defendant seeks to shelter himself, in other words, without the knowledge of any facts such as a belief might be based on, it could not be said that he was acting upon any thing which could be called a belief at all, and

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if, as in the present case, the defendants knew that the facts which would have furnished a defence had no existence it is difficult to understand how they can claim protection.

The case of *Boothby v. Morton*, 3 B. & B. 239, may at first appear opposed to this view, but when carefully considered I do not think it is so. It is not shown in the report what were the precise powers and duties of the commissioners, nor did it appear that they in any respect contravened the provisions of the Act, nor did the Court so presume. It would seem, therefore, to be simply a case in which the commissioners had acted in excess of their powers in throwing the dirt taken from the canal upon the plaintiff's premises, for which an action would lie, but that action had to be brought within the limited time.

The case is not referred to by the Court in the subsequent case of *Oakley v. Kensington Canal Co.*, 5 B. & Ad. 138, though it was referred to and explained by counsel during the argument. I confess I am unable to understand the judgment in the latter case, and if it is intended to decide that when in an Act of Parliament certain preliminaries have to be complied with before a party is authorized to enter upon the lands of another, that party can deliberately disregard those preliminaries and still claim that he is acting upon the powers given by the statute and in pursuance of them, I must admit that it is opposed to my contention, and if good law is fatal to the plaintiffs' recovery.

But the later cases, to which I have referred, seem to be opposed to that view and to hold that the provision is intended for the protection of persons who honestly and *bonâ fide* mean to discharge their duty, and to save harmless those persons who act illegally under the reasonable belief that they are authorized under the Act of Parliament.

As to the point now raised by the Court, as to the action being maintainable by reason of the trespass being in the nature of a continuing damage, I should be unwilling, at this stage of the case, to give effect to it, even if I thought

it less open to question than I do, not only in consequence of its never having been raised during the trial, but also on account of the failure of the parties to assist us by argument, even after the point had been brought to their attention.

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I think the action was brought simply for the value of the timber cut and the damages resulting from such cutting, and there is nothing in the evidence to shew that any cutting was done by the defendants during the interval from the first day of December to the expiry of the license, or that they were during that interval in possession or exercising any acts of ownership, and I regard it as straining the law to meet what must strike everyone as a harsh proceeding against these plaintiffs, to place the action now upon any such footing. In my view of the invalidity of the section of the Act itself it is not, however, necessary to offer any opinion upon it.

If the view I have already expressed as to these defendants not being in a position to invoke the protection of the statute, had been concurred in by the other members of the Court, and I am free to admit there is room for doubt upon the case, I should have been only too pleased to refrain from the expression of any opinion upon the question of *ultra vires*, and it was chiefly with that object that I have devoted so much attention to the other branches of the case. But in consequence of that difference of opinion, and because I do not agree with some of my learned brothers upon this point also, I feel it right to state my reasons for so differing.

If as alleged in the fourth reason against the appeal "the limitation in section 27 necessarily forms part of the legislation affecting railways under the jurisdiction of the Dominion," I concede at once that it must be within the competence of that Parliament to deal with it—the matter would not be arguable. It must be clear, apart altogether from authority, that where power is given to a particular Legislature to legislate on a certain subject, such power includes all the incidental subjects of legislation which are necessary to carry it into effect. See *Cushing*

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v. *Dupuy*, 5 App. Cas. 409. The grant of the power to legislate necessarily includes everything required to make the legislation effectual.

The power of the Provincial Legislatures to deal with railways is derived from that sub-section of section 92, which gives them the exclusive power to deal with property and civil rights. The authority of the Dominion Parliament to deal with them is not among the specific and enumerated powers set forth in section 91, but depends upon a particular construction of the words "works and undertakings" in sub-section 10 of section 92, and the exceptions contained in that sub-section.

If that particular construction is correct, then the jurisdiction arises from the fact that it is one of the matters not coming within the class of subjects assigned exclusively to the Legislatures of the Province.

This sub-section has given rise to a great diversity of opinion, one construction being that the true meaning to be attributed to these words is that they refer to *public works only*, whilst another is that conceding that they do apply to the undertakings controlled by private companies, that it is only after such works are completed and in operation that the right of the Dominion to legislate arises, and that in the meantime power must be sought from the Local Legislature to give the usual powers of expropriation, and other matters connected with the construction.

This last contention receives perhaps some confirmation when we come to the last exception in the sub-section—viz., "such works as although wholly situate within the Province are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada." If by this is intended that such work is immediately upon the declaration, even though not commenced to be executed, placed under the jurisdiction of the Dominion Parliament, it involves the possibility of preventing such a work coming into existence at all, if the Parliament happened to disapprove, as in a supposable case it might do.

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If it is clear that it is within the jurisdiction of the Dominion Parliament, nothing can be urged against its refusal to allow the work to proceed, but putting this as a test of the extent of the power to assume jurisdiction, the anomalous result is possible that in place of a *work* authorized by the Local Legislature being brought under the jurisdiction of the Dominion Parliament, which is what the section contemplates, there can be no such work.

These considerations would seem to lead to the conclusion that even if *works* include private undertakings of a *quasi* public character, it is only as completed works that the right to legislate arises.

With these matters, however, we have no concern at present. It is perhaps unfortunate that matters involving such large interests had not before this come up for adjudication and final settlement. The questions arose incidentally in *Foran v. McIntyre*, 45 U. C. R. 288, and *Booth v. McIntyre*, 31 C. P. 183, but those cases went off upon another point.

Our enquiry is confined to the one point, viz., that conceding the right of the Dominion to deal with railways of this kind, whether it had power to deal with a matter of procedure, which "the limitation of actions" undoubtedly is.

No inference in favour of such a power can be drawn from the fact that the old Province of Canada in its railway Acts enacted such provisions; having plenary powers not only over railways but generally over property and civil rights, they had an undoubted right to pass such a law.

I apprehend that if the right of the Province to authorize the construction of railways had been derived solely from sub-section 10 of section 92, the exclusive power to deal with "property and civil rights" being vested in the Dominion, this point would never have arisen.

At the time of these trespasses the period of limitation under both systems of legislation was the same, although the Dominion Parliament has since altered its limitation to twelve months. The question in itself is unimportant,

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but it is of the gravest importance and absolutely necessary to the practical working of the federation system that the line of demarcation between the powers of the two legislative bodies should be strictly and clearly drawn.

It would savour of pedantry to refer at any length to the rules laid down by the Privy Council, and so frequently invoked as the proper guides in the interpretation of the British North America Act, as to the distribution of these legislative powers ; but to make an application let us take by way of illustration the subject "Bills of Exchange and Promissory Notes." But for their being specifically enumerated in section 91, they would fall within the exclusive jurisdiction of the Province, under the power given to them to deal with property and civil rights. This, uncontrolled by the exception of section 91, would include all contracts, as it would include procedure in civil actions.

When we refer to section 91 we find this particular contract excepted, the exclusive right to legislate upon it being given to the Dominion. The Parliament of the Dominion therefore has the most complete and absolute power to deal with this description of contract to the exclusion of the Province. Adopting the same test when dealing with the question of procedure, the only exception that we find is in those provisions which enable the Dominion to establish Courts of its own, as for instance Bankruptcy and Insolvency and Maritime Courts. With these exceptions the power to deal with procedure, including the power to limit the time for bringing any action, is vested exclusively in the Local Legislatures, and this view is strongly confirmed when we refer to section 94, which empowers the Dominion Parliament to make provision for uniformity of any laws relative to property and civil rights, and to the procedure of the Courts, *only* on the consent of the Provinces.

When therefore we find a Parliament whose powers do not extend to deal with property and civil rights, except in the instances specifically enumerated, it is difficult to suggest a reason for the validity of the exercise of the power in the present case.

It is not without significance that the railway companies under Dominion jurisdiction, have sought and obtained from the Local Legislature powers to enforce the attendance of witnesses before arbitrators appointed to ascertain the compensation under the Railway Act, and to give an appeal against the award of the arbitrators—by an Act passed in 1874, and now to be found in the Revised Statutes—these being matters of procedure with which the Dominion Legislature has no power to deal.

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J.A.

I am of opinion, therefore, that the power to limit the period for bringing an action of this nature rests exclusively with the Local Legislature.

Whether, as the respondents suggest, it might, as a matter of policy, be better to have one uniform law of limitations as regards railways under the jurisdiction of the Dominion, cannot affect the legal question, but as one of convenience or inconvenience, much may be said in favour of the view that it is highly undesirable to have two distinct periods of limitation for the same description of injury in the same Province, whereas it can be of little importance to the railway companies whether the periods of limitation differ in the various Provinces.

For these reasons I am of opinion that the judgment below is erroneous, and that the appeal should be allowed.

OSLER, J. A. :—

The defendants are a railway company, incorporated by several Acts of Parliament for the purpose of constructing a railway from Gravenhurst to Callendar. The line of railway was surveyed, and the map, or plan, and book of reference mentioned in the Consolidated Railway Act were duly filed in the proper office as required by law before the defendants proceeded with the construction of the road. The plaintiffs were then holders of timber licenses from the Ontario Government embracing part of the territory through which the defendants' line of railway extended, and this action is brought to recover damages

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for timber cut by the defendants within the plaintiffs' license limits ; (1) on the line of the railway ; (2) within a belt of six rods on either side thereof ; and (3) outside the six rod belt. The plaintiffs' right to recover for anything they can prove themselves entitled to under the third head of damages is not in dispute, and as regards the other two it is conceded that the acts complained of were done on the defendants' right of way during the course of construction, and for the purpose of the construction of the railway, and in felling trees on each side of the railway in exercise of the powers conferred by section 6 (12) of the General Railway Act.

The substantial questions are (1) whether the limitation of time mentioned in section 27 of that Act applies so as to prevent a recovery in respect of these items of the claim, the defendants' acts which caused the damage having been committed more than six months before the commencement of the suit ; if so (2) whether that section is *ultra vires* the Parliament of Canada as infringing upon the domain of property and civil rights.

The answer to the first question depends upon whether such damage can be said to be damage or injury "sustained by reason of the railway," and "done in pursuance of and by the authority of" the general Act and the defendants' special Acts within the meaning of section 27. I note that the former expression seems to find its proper interpretation and limitation in the latter. It is not unlike the language of the Act in question in *Arnold v. Hamel*, 9 Exch. 404, "for anything done in the execution of or by reason of his office." It is not, however, substantially different, as regards the protection afforded by it, from the enactments in question in other cases to which I shall refer, which receive a similar construction.

The plaintiffs contend that the section does not apply, because the defendants had not obtained the consent of the Lieutenant-Governor in Council (R. S. O. 1877, ch. 165, sec. 9, sub-sec. 3) to enter upon the land and construct their railway, and had neither agreed with the plaintiffs

for compensation, nor taken the proceedings pointed out in the Railway Act to entitle them to tender compensation and pay it into Court; and that until such consent had been obtained, and proceedings taken, the defendants were merely trespassers in all that they did, their very entry upon the land for the purpose of constructing the railway being illegal and unauthorized by this Act.

The consent of the Lieutenant-Governor in Council to appropriate the wild or waste unsold lands of the Crown lying in the route of the railway and necessary for its construction, if such consent can be deemed necessary in the case of a railway incorporated by Parliament, is a matter with which I am disposed to think the plaintiffs are not concerned. At all events, its absence in the present case is neither pleaded nor proved.

The other point is, however, one of considerable importance, and was strongly pressed upon us, though I conceive that it is really covered by authority.

It is clear that the protection of the section extends, as was said by Sir John Robinson in *Roberts v. Great Western R. W. Co.*, 13 U. C. R. 615, to the case of damages occasioned by the company in the exercise of the powers given, and I note that he adds "assumed by them to be given for enabling them to construct and maintain their railway," and it has even been held to extend to damages arising from negligence in the management and working of the road: *Kelly v. Ottawa Street R. W. Co.*, 3 A. R. 616, at p. 620.

It is also clear that the defendants in entering upon the plaintiffs' limit and cutting down and removing the timber on the line of the railway and belts, without having complied with the preliminaries which the statute requires to be observed before the right to do so would vest in them (R. S. C. ch. 109, sec. 8, sub-sec. 30), were wrong-doers, even though the acts complained of were done after the filing of the plan and book of reference, and in the construction and for the purpose of the railway, and an

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action of trespass lies against them therefor : *Parkdale v. West*, 12 App. Cas. 602.

Nevertheless, the fact that the defendants are wrongdoers, does not of itself disentitle them to the protection of the Act, for if they were not wrongdoers they would not need it. We must be careful, therefore, not to make the fact or the extent of their wrongdoing the test of the application of the statute, for the wrong is not condoned, but is merely required to be prosecuted within a shorter period of limitation.

It may be useful to refer to some of the decisions which govern the construction and shew the application of such an enactment as that under consideration. One of the earliest is *Gaby v. Wilts and Berks Canal Co.*, 3 M. & S. 580 (1815), which has been approved in many subsequent cases. There the defendants' special Act empowered them to supply their canal with water from all streams within a certain distance, except during a particular specified season, and the action was brought for taking water during the prohibited season. Their Act contained a clause substantially similar to section 27 of the Railway Act, (see *Arnold v. Hamel*, 9 Exch. 404, where the case was cited and unsuccessfully attempted to be distinguished,) and although the defendants had acted in direct violation of the Act they were held entitled to its protection.

Lord Ellenborough said, "It appears to me that the clauses of this Act were meant to relate to persons entrusted with and in the fair execution of its powers, though they may have done that which the Act does not permit, to this extent, that any question touching those persons should be brought to a speedy decision, and no further."

Le Blanc, J.: "The clause of the Act is a sort of statute of limitations, prescribing the time within which the company are to be made liable for anything done by them *in their corporate capacity*. It does not protect them from answering in damages for any act which they may unlawfully commit, but only provides that these

damages shall be sued for within a certain time." Then he points out that the company are not liable at all for the things done within their strict jurisdiction or in the due execution of their powers, and adds that the words "in pursuance of" must therefore be meant of such actions as are brought against them for things done wherein they have offended against the Act. "The question is not *to what extent* they have offended, nor whether the company have done this in such a manner as to *clothe themselves with the character* of persons conforming in all respects to the authority given them by the Act, but whether they have done this wilfully and maliciously. If they did it *bonâ fide* they will be protected as to the time of commencing the action."

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Bayley, J.: "The question seems to come to this, whether the company were acting *bonâ fide*, for if they are not so acting they are not brought within the protection of the Act. If they are acting for the purpose of making or maintaining the canal, I think it was the object of the Act to afford them this limited protection. The object was that for all such things the enquiry should be brought to a speedy trial, and the matters examined recently after they took place."

I refer also to *Blakemore v. Glamorganshire Canal Co.*, 3 Y. & J. 60 (1829), a case not unlike that of *Gaby v. Wilts and Berks Canal Co.*, 3 M. & S. 580. The defendants were sued for illegally diverting water from the plaintiffs' works. It was found that they had wilfully wasted the water in the management of their canal, and it was contended that there was no protection because the act complained of was not done in pursuance of the statute. I quote from the judgment of Garrow, B.: "From the language of the Act of Parliament, from the reason of the thing, and for the convenience of all parties it must, I think, be expected that a person who finds injury accruing to his property by the neglect or aggression of another shall be looking to his interest, and shall be prompt in his endeavour to procure a redress for that injury. * * * My understanding of

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this Act is, that if in carrying on that object which I am permitted by the Legislature to do under certain regulations, either by design, or accidentally, something happens in the execution of that purpose, which incidentally produces injury to another, for that I am, and in common justice I ought to be, responsible ; but the party is promptly to resort to his remedy."

The case of *Boothby v. Morten*, 7 Moore 51, 3 B. & B. 239, is in point. That was an action of trespass against the defendant as surveyor to the commissioners under the Witham Drainage Act, 2 Geo. II. ch. 32. The Act provided that where persons should refuse or neglect to treat for property which the commissioners required, the latter might issue their warrant to the sheriff to impanel a jury to assess the damages, and that upon payment or tender of the sum so assessed, the commissioners might enter upon and use the lands. The Act contained a clause limiting the commencement of actions to six months after the act complained of. The surveyor *took land* of the plaintiff for the purpose of widening a ditch, nearly a year before the action, and it was held that he was entitled to claim the protection of the Act, though the commissioners had neither made the compensation required for the property to be taken, nor pursued the course, on the observance of which only the statute enabled them to enter upon the lands of others. See also *Wordsworth v. Harley*, 1 B. & Ad. 391, which I shall refer to again ; *Hughes v. Buckland*, 15 M. & W. 346, at p. 356 ; and *Oakley v. Kensington Canal Co.*, 5 B. & Ad. 138, where the defendants were held to be within the protection of the limiting clause, inasmuch as the wrongful act was really done for the purpose contemplated by the statute, though in the prosecution of that purpose, and to enable them to commit the wrongful act, they had been guilty of a misrepresentation amounting to bad faith towards the occupier.

Jones v. Gooday, 9 M. & W. 736, is a similar case. Commissioners under a local Act had taken the plaintiff's land

for the purpose of widening a drain without his consent as required by the Act, and without taking compulsory proceedings under the Act. The Act (secs. 113, 114) provided that no one should recover in any action for anything done in pursuance of the Act unless twenty-eight days notice of action was first given, nor if tender of amends was made before action, nor unless the action was brought within three months from the act committed.

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Lord Abinger was of opinion that the case was clearly within the provisions of the Act of Parliament: "There are two points of view in which cases of this class may be looked at: one as against a party who has been authorized to proceed, and the other as in the case of an act done which was not authorized by Parliament at all. These are two very different cases and should not be confounded together. * * * Now here is a case where it is admitted that the commissioners are authorized under the Act of Parliament, only they have not used their powers *modo et formâ*; they are authorized by the clause 'to enlarge, alter, and cleanse the rivers, sewers, &c.' Can it be said that those are words that are not affected by, or that these powers have no relation to, the clause 'that no action or suit shall be brought against any person or persons for anything done in pursuance of this Act or in relation to the matters herein contained?' Who can doubt that widening of sewers is a thing relating to the matters therein contained? This is an action for doing a thing in respect of the matters therein contained, though not executed *modo et formâ*." Alderson, B., says: "If the act done was such that no reasonable man could, in doing it, be supposed to have acted *bonâ fide*, that would be another question. In the case of *Cook v. Leonard* (6 B. & C. 351), the Court must have considered that no reasonable man could have acted as the defendant did; and that it was not merely gross ignorance on his part but amounted to *mala fides*."

I shall only add a reference to *Poulsum v. Thirst*, L. R. 2 C. P. 449, and to *Selmes v. Judge*, L. R. 6 Q. B. 724, in which the principle of these decisions is approved of by

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the Court. Blackburn, J., in the latter case thus quoting *Wordsworth v. Harley*, 1 B. & Ad. 391: "The question (there) arose upon a former Highway Act; a very high-handed course had apparently been pursued by the defendant, a surveyor of highways, who took a portion of the plaintiff's field and added it to a public road without the plaintiff's consent: Lord Tenterden, C.J., with the concurrence of the rest of the Court, held that the defendant was entitled to the protection of the Highway Act, though he considered the case to be very unfortunate for the plaintiff. It was assumed in that case that if in repairing highways the surveyor illegally and improperly took a portion of land, he was acting in pursuance of the statute, and might shelter himself under its provisions."

It appears to me that the rule derivable from these cases is that in considering whether the act complained of was done in pursuance of or under the authority of the Act, the question of *bonâ fides* largely depends upon the capacity in which, and the purpose for which, the work was done, that is to say whether it was really done in the corporate capacity of and for the purposes of the company, or in the course of its business, and in the promotion of the contemplated works. The cases of *Detlor v. Grand Trunk R. W. Co.*, 15 U. C. R. 595; *Follis v. Port Hope, &c., R. W. Co.*, 9 C. P. 50; *Auger v. Ontario Simcoe and Huron R. W. Co.*, 9 C. P. 164; *Brock v. Toronto and Nipissing R. W. Co.*, 37 U. C. R. 372, support this view, and in the two former the wrongful act was of a nature very similar to that now in question.

Can then these defendants be considered as founding these acts upon the powers given by Parliament?

They were empowered to build a railway, and to proceed with its construction after its route and the lands required had been ascertained by the deposit of maps, plan, and book of reference, and after certain further preliminaries to enter upon the lands so ascertained. The course of the railway lay through a wilderness and the defendants omitted these last preliminaries, and in so doing destroyed

property of the plaintiffs, which was the subject of compensation. These acts, however wrongful, were not merely colourable, but were unquestionably done in the course of construction of the railway, and for the purpose of executing the works authorized by the special Act. So much indeed is expressly admitted in the case. It is evident that it was under the professed authority of these Acts and in exercise of the power conferred upon them to build the railway, that the railway was built and the wrongful acts done, and that the land was really taken and cleared for that purpose, and for no other. There is an entire absence of evidence of *mala fides* or of any knowledge or notice on the part of the defendants of the plaintiffs' rights or that they were not lawfully carrying and constructing the railway through waste lands of the Crown. It follows that the injury was one sustained by reason of the railway and done in pursuance and by the authority of the general and special Acts within the meaning of the section.

What I have said applies to that part of the plaintiffs' claim for the timber cut upon the belts and taken and destroyed by the defendants, as fully as to that for the timber cut upon the actual line of the railway. Whether, if this had been rightfully cut it would have become or remained the property of the plaintiffs need not be decided. I see no reason at present for differing from my brother Street's view upon this point. The act was wrongful, a complete cause of action arose when it was committed, and I find no authority for saying that the plaintiffs can extend their rights by resorting to an action for conversion instead of trespass. See *Fraser v. Swansea Canal Co.*, 1 A. & E. 354; *Jenkins v. Cooke*, 1 A. & E. 372 (n.)

The remaining question relates to the power of Parliament to enact section 27, which being a sort of clause of limitation, infringes as it is said upon the exclusive right of the Provincial Legislature to make laws in relation to property and civil rights in the Province. Having regard to the history and object of this clause, and to the principles enunciated in *Valin v. Langlois*, 3 S. C. R. 1; and *Cush-*

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ing v. Dupuy, 5 App. Cas. 409, which have been so frequently quoted that it is needless here to repeat them, I am clearly of opinion that it is not *ultra vires*.

The constitutional Act invests Parliament with the exclusive power to make laws in relation to such a company as the defendant railway company, and also for the incorporation of companies with other than provincial objects. A provision similar to section 27 has formed part of the system of railway legislation both in the special and general Railway Acts of this Province, and I think of other Provinces of the Dominion, prior and subsequent to Confederation, and it may also be found in the English special Railway Acts. It is not a mere arbitrary provision foreign to the scope and object of this class of Acts, but rests upon a principle according to which the Legislature, not only in this country but in England, has been accustomed, in the case of Acts for the construction and carrying on of railways or other works or undertakings, to provide that claims against the company for injuries arising out of the execution of the large powers entrusted to them, shall be promptly brought to an examination.

That principle, as stated by Lord Ellenborough in *Gaby v. The Wilts & Berks Canal Co.*, 3 M. & S. 580, is that it is not just that the company should be visited for its acts after any great lapse of time, for as they are a fluctuating body, what may be just to-day may not be so at a future period. It might be visiting the transgressions of one set of persons upon the heads of others not connected with the acts. Wherefore the Legislature has reasonably limited the period of action. Similar observations are to be found in other cases which I have already referred to. Another object, no doubt, was that actions which might involve nice enquiries as to whether the company had exactly followed or had exceeded the powers entrusted to them, should be brought while the damage was recent and the facts within the knowledge of the parties.

It seems to me impossible to say that a clause of the nature of that we are now considering is not, for the above

and other reasons which might be suggested, well within the competence of Parliament to pass in order to legislate generally and effectually on a subject within its exclusive powers, even though it may, to some extent, trench upon the subject of property and civil rights. The argument which strikes at the validity of this clause attacks also the power of Parliament to pass the compensation clause and others relating to the compulsory acquisition of land by railway companies, and pushed to its legitimate conclusion, I am not sure that as to any corporation within the legislative domain of Parliament, it would not leave to Parliament merely the power to create a naked corporation, which must acquire (if it can) most of its useful powers and protective enactments from a Local Legislature. I refer to *Smith v. Merchants' Bank*, 28 Gr. 629, 8 A. R. 15; *Doyle v. Bell*, 11 A. R. 326; Pomeroy's Constitutional Law, sections 437, 438.

But for the breaks in the plaintiffs' title I think it might have been held (though this was a point not pressed upon us, or indeed argued) that the trespasses ought to be regarded as continuous so as to exclude the operation of section 27, by reason of the laying down of the rails upon and over the plaintiffs' limits, and leaving them there up to the time of the expiration of the last license, which was within six months before the commencement of the action. The law on this subject is elementary, and is concisely stated by Mr. Justice Strong in *Ross v. Hunter*, 7 S. C. R. 289, at p. 313.

The licenses, however, do not cover a continuous period from July, 1883, the date of the earliest; indeed, by law, each license terminated on the 30th of April in each year, and breaks of considerable length occur between that date and each renewal. I see nothing in the evidence, or in the statute, R. S. O., 1887, ch. 28, which justifies me in holding that the plaintiffs had any other interest in or title to the limits than that which the licenses themselves express, even when taken in connection with the conditions, regulations, and restrictions imposed by the Orders in Council.

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so far as these are not opposed to the express prohibition of section 1, sub-section 2: *Contois v. Bonfield*, 27 C. P. 84, 90.

The case as I look at it calls for no opinion as to the right of the plaintiffs to obtain compensation under the Railway Act, and my conclusion upon the whole is that the appeal should be dismissed, although if the plaintiffs think it worth their while to have the reference amended, as suggested by the learned Chief Justice, I have no objection to concur in that disposition of the case.

MACLENNAN, J. A. :—

The question in this appeal is whether the plaintiffs' action is barred by section 27 of the Dominion Railway Act, 1879, 42 Vic. ch. 9, (R. S. C. ch. 109.)

The learned trial Judge held that the cutting of the timber having been completed at the end of the year 1885, and the action not having been brought within six months thereafter, it was too late.

The contention of the appellants before us was that the section in question is *ultra vires* the Dominion Parliament, and that if not it is inapplicable to the circumstances of this case.

I have come to the same conclusion as my learned brother Burton, that the appellants are right in both these contentions, and I agree substantially in his reasons.

It was taken for granted on the argument, that Parliament could not only incorporate railway companies, that is, could give them corporate capacity, or the power to act as an individual might act, but could also so far interfere with property and civil rights in the province as to confer upon such companies the power of expropriating land, and other powers which might be necessary to enable them to carry out their undertaking. But it was contended that a limitation clause such as that in question was not necessary, and was therefore beyond the power of Parliament.

It was urged upon us as a proof that such a clause was

necessary, that it had formed part of the railway legisla-
tion of the old Province of Canada from the year 1851
until Confederation, and was adopted, and has been re-
tained by the Province of Ontario to the present time, in
the case of railways incorporated by the Province: and
besides that it has also rightly or wrongly been one of the
clauses of the Dominion Railway Act since 1868.

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MACLENNAN
J.A.

I think this argument would have been entitled to a
good deal of weight if the same thing had been done in
other countries. If such a clause were reasonably necessary
for railways, we should expect to find it in the railway
legislation of the mother country and of the United States.
But I have not been able to find that it has been adopted
either in England or in any of the States of the Union,
and so I think no safe inference can be drawn from the
enactments referred to.

The Dominion Parliament, by its Railway Act of 1888,
has changed the period of limitation from six months, as
it has been in this country for nearly forty years, to one
year, thus indicating, as I think, that the proper period is
a purely arbitrary matter, and one that cannot be fixed
upon any grounds or reasons peculiar to the nature of
railways or railway companies. I am myself unable to
perceive any reason, and none was suggested to us, for
shortening the period for enforcing such claims against a
railway company which would not be equally applicable
to similar claims against any other kind of company, or
against any of her Majesty's subjects. I think the clause
an unnecessary interference with the law of property and
civil rights in the Province, and that it is therefore not
within the powers of Parliament: *Parsons v. Queen Ins.*
Co., 7 App. Cas. 96.

But I also think that even if the clause is *intra vires* of
Parliament, the defendants are not protected by it in the
present action. The clause runs thus: "All actions or suits
for indemnity for any damage or injury sustained by reason
of the railway, shall be instituted within six months next
after the time when such supposed damage is sustained,

Judgment. or if there is continuation of damage, within six months
MACLENNAN next after the doing or committing of such damage ceases,
J.A. and not afterwards; and the defendants may plead the
general issue and give this Act and the special Act and
the special matter in evidence at any trial to be had
thereupon, and may prove that the same was done in
pursuance of and by the authority of this Act and the
special Act."

The defendants allege, and in order to bring themselves within the protection of the section, they must prove, that the damage or injury of which the plaintiffs complain was "sustained by reason of the railway."

What the defendants did was this; they filed their plan and book of reference, but they never agreed with the plaintiffs for the compensation to be paid, or gave them the notice as required by section 9, sub-section 12 of the Railway Act (1879). They then entered upon the lands, and cut the timber of the plaintiffs.

Now it is clear that they had no right whatever to enter the lands or to cut the plaintiffs' timber as they did, without the plaintiffs' consent, and without first doing what the statute prescribes for making compensation therefor, as required by sub-sections 27 and 28 of section 9 of the Railway Act: *Parkdale v. West*, 12 App. Cas. at pp. 613, 614.

I am utterly at a loss to understand how the defendants can be heard to say that the plaintiffs' damage or injury was sustained by reason of the railway, when they never took the steps prescribed by the Legislature to authorize them to enter upon the lands at all.

In my humble judgment the section has no more application to this case than if they had taken the plaintiffs' oxen or horses, or their steel rails or other materials, without consent or payment, and had used them for the railway. The defendants could not take the oxen, horses, or rails without leave or payment, and the only difference in the case of land and the timber growing on it is, that there are two ways in which they may acquire the latter. They may acquire them by private bargain with the

owner, or they may expropriate in the manner prescribed by the statute. But they may not touch the one or the other until they have in some way acquired the right to do so. If not, how can it be said that taking my land or timber without my consent, and without compensation, is an injury by reason of the railway, while taking my oxen or horses, or rails, is not?

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 J.A.

I think the Legislature has thrown a good deal of light on the meaning of the words "by reason of the railway" by the language used at the end of the section, saying that the defendants may prove that the same, that is what is complained of, was done in pursuance of and by the authority of this Act, and the special Act.

How can it be said that what was done here was done in pursuance of and by the authority of the Railway Act? The Act says to the company, "You may buy land and timber and rails and other materials to build a railway, and if you require land which the owner is unwilling to sell, you may take it against the owner's will, by making compensation, and then you may go on and build your road." They take land and timber without either buying it or making compensation, and they say that was done in pursuance of and by the authority of the Act. In my humble judgment so far from having been done in pursuance of and by the authority of the Act, it was plainly done in contravention and in violation of it.

I think no sound distinction can be made between the taking of land or timber without bargain or compensation and the taking of other property or materials for the use of the railway, and that if the section is not applicable to the case of oxen or rails or other personal property, it is equally inapplicable to the case of land.

I think that the case of *Brock v. Toronto and Nipissing R. W. Co.*, 37 U. C. R. 372, was well decided, and is applicable to the present case. The only difference between that case and this is that the Nipissing Company had no power to expropriate the gravel which they took for their road, while in the present case the defendants might have ex-

Judgment. appropriated the plaintiffs' land but did not do so. I cannot
MACLENNAN see that that circumstance should make any difference in
J.A. the applicability of the section.

But I am also of opinion that this is a case of continuation of damage, and so that the action was brought in time.

Under the authority of the statute R. S. O. 1877, ch. 26, the Act respecting the sale and management of timber on public lands — sections 1 and 2, the plaintiffs had, as license holders, the right to take and keep exclusive possession of the licensed lands, subject to the regulations established by the Lieutenant-Governor in Council, and had also the right of property in all trees, timber, and lumber cut during the term either by themselves or others. They also had the right to institute actions against any wrongful trespasser and to recover damages.

By the timber regulations of the 16th of April, 1869, referred to in the licenses, and as published in the *Gazette*, each license was to be for one year and no more, with a right of renewal if desired, and if applied for before the 1st of July following. These licenses are put in evidence, namely those for the years 1883-4, 1884-5, and 1885-6, each ending on the 30th of April in each year, and the present action was commenced on the 9th of September, 1886.

The action is against the railway company and the contractors who built the line, and after stating the plaintiffs' title and rights as licensees the statement of claim goes on to allege that in the autumn of 1884 the defendants entered the licensed lands, and cut and removed timber belonging to the plaintiffs, both on the line of railway and on the adjacent belts and other places, and continued to do so for about a year; and that the company laid out and constructed a line of railway through a portion of the lands, and laid rails thereon, and committed great waste and damage. It further alleges that the defendants wrongfully broke and entered into and upon the lands, and wrongfully used the same, and deprived the plaintiffs of the use thereof, and it claims damages for the timber taken and the trespass and waste complained of.

The company's defence is the usual defence of "not guilty by statute," referring to section 27 of the Dominion Railway Act of 1879. Judgment.
M'ACLENNAN
J. A.

The defendants, the contractors, also plead "not guilty by statute," referring to the several Acts of the Dominion Parliament incorporating the company, as well as to the Railway Act; and they also set up, and justify under, their contract with the company, and say that they cut the timber and built the railway across the plaintiffs' limits under the authority of the company.

The case was tried upon admissions agreed upon for the purpose, from which it appeared that the company filed a plan and book of reference, and they and the contractors then entered upon the lands and cut the timber, and used it on the line of their road during the course of and for the purpose of constructing the railway, all the cutting and conversion of timber having taken place before the commencement of the year 1886, and the railway having been completed and running since the end of July, 1886. It was also admitted that timber had been cut upon the adjacent belts as authorized in section 7 (14) of the Railway Act. It was admitted that the company had taken no step whatever towards making compensation for entering upon the lands or cutting the timber. It appears not to have been argued before the learned trial Judge that the case was one of continuation of damage, and that the damage had not ceased until within six months of the action, and the point was barely mentioned in the argument before us by Mr. Finlay on behalf of the appellants.

It seems to have been assumed by the parties all along, that the plaintiffs' title under their license was continuous, from the issue of the first license put in until the expiration of the third, and for the present I shall assume that to be so.

The action is trespass *quare clausum fregit*, and complains of the original unlawful entry of the defendants, and of everything they did from that time until the bringing of the action. What really took place was that the defend-

Judgment.
MACLENNAN
J.A.

ants entered unlawfully, and commenced and continued their operations, upon the land, without interruption, until their railway was in running order, and when that stage was reached they continued to maintain and use it as a railway until the action was commenced. I think that was one continuous, uninterrupted trespass, and a case of continuation of damage within the meaning of the statute, down to the 30th day of April, 1886, when the last of the licenses put in expired, and a time within six months of the commencement of this action: Addison on Torts, 261, 964, 967; Pollock on Torts, 313; Mayne on Damages, 88, 89; *Holmes v. Wilson*, 10 A. & E. 503; *Battishill v. Reed*, 18 C. B. at pp. 712, 716, 718; *Ross v. Hunter*, 7 S. C. R. at pp. 311, 313.

The case was presented to the learned Judge, and his judgment proceeds, upon the notion that the damages ceased with the cutting of the timber at the end of the year 1885, in which case the action would have been more than two months too late. But although the cutting of the timber is the principal and by far the greatest part of the injury to the plaintiffs, it is not the only injury. The entry made by the defendants for the purposes of the railway and the continuous occupation and the daily use by them of the lands, to the possession of which the plaintiffs were alone entitled, was an actionable wrong, and in law as much a damage as the more injurious acts of cutting down the plaintiffs' timber.

It is very evident that all that was done here was in reality one transaction. It was the making of the railway on the plaintiffs' land, which was begun in the fall of 1884, and was completed at the end of July, 1886, a little over a month before action brought.

I think the plaintiffs might have stated their case under the former system of pleading, thus: "For that the defendants broke and entered the plaintiffs' lands and built a railway thereon, and cut down and destroyed large quantities of the plaintiffs' timber growing thereon, and other wrongs, &c." And in such an action they could

have recovered for all the damage and injury the defendants did in carrying on their works. The breaking and entering is the gist of the action, and the cutting of the trees, &c., matter of aggravation, although possibly the most injurious part of the trespass : *Anderson v. Buckton*, 1 Str. 192 ; *Bennett v. Allcott*, 2 T. R. 166 ; *Taylor v. Cole*, 3 T. R. 292 ; *S. C.*, 1 H. Bl. 555 ; *Bush v. Parker*, 1 Bing. N. C. 72 ; *Pratt v. Pratt*, 2 Exch. 413 ; *Kavanagh v. Gudge*, 7 M. & G. 316.

Judgment.

MACLENNAN
J.A.

If it is said that although the continued occupation of the land was a continuous damage, yet the cutting down of the trees was not, but was done and complete once for all, more than six months before action, and that so that part of the claim at all events is barred, the answer, in my judgment is, that the two things are inseparable, that the cutting of a tree by a trespasser is part of the trespass, part of the injury which he does to the land. As long as he remains upon the land his trespass continues, and what he does while he is there, whether it is cutting down trees or anything else, is merely matter of aggravation. I think it would be impossible for a plaintiff who had recovered for a trespass upon his land extending over a length of time, to support another action for injury done to the same land, during the same trespass, by cutting down the trees.

In *Brunsdon v. Humphrey*, 14 Q. B. D. 141, separate actions were allowed for the injury to the plaintiff's property and his person, arising from the same act of negligence, on the ground that the rights injured were different, but here the whole injury was to the plaintiff's property. While a man is engaged in cutting down a tree on another man's land he is committing a trespass by his very presence there, as well as by his cutting, and it would be a strange state of the law, if there could be separate recoveries for the two acts. On the same principle there might be a recovery for the trespass of walking over the plaintiff's land, and another for the herbage which the trespasser trampled down and destroyed in the same walking. The proper conclusion in my judgment is, that every

Judgment. trespass to land may be committed with circumstances of
MACLENNAN greater or less aggravation, and that in every action for
J.A. such trespass the aggravation may be alleged and proved,
and may be allowed to enhance the damages.

I am unable to see how it is possible to contend that the trespass to the land itself in this case was not continuous and uninterrupted, and therefore a continuation of injury and damage from the very first day of entry upon it until the day the action was brought, or that the action for that part of the injury or damage was not brought in sufficient time, and if that is so I think it clear that the cutting of the timber cannot be excluded from consideration for the purpose of enhancing the damages.

I am clearly of opinion, as was said by Sir John Robinson in *Snure v. Great Western R. W. Co.*, 13 U. C. R. 376, that the continuation of the trespass to the land has saved all the damage done while the defendants were there, including the cutting of the trees both upon the railway track and upon the adjacent belts. See also *Anderson v. Buckton*, 1 Str. 192, and *Bennett v. Allcott*, 2 T. R. 166.

A difficulty, however, arises in the plaintiffs' way, from the fact that there was an interval of time between the periods covered by the three licenses constituting their title, and it is contended that for this reason their damage cannot be regarded as continuous.

The first license was dated on the 5th of July, 1883, and extended from that date to the 30th of April, 1884. The second license was dated the 10th of December, 1884, and extended to the 30th of April, 1885. The third was dated the 22nd of July, 1885, and expired the 30th of April, 1886. There was therefore an interval of nine months and ten days between the first license and the second, and an interval of two months and twenty-two days between the second and third.

The entry of the defendants was in the fall of 1884, but we are not told whether it was before or after the 10th of December in that year, the date of the second license. But whatever was the exact date of the first entry by the de-

fendants, and the commencement of the cutting by them, the cutting continued, when once begun, until the end of the year 1885, and while it was going on the third license was issued on the 22nd of July, 1885.

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J. A.

Now it is admitted that the defendants entered without any consent or license from the Ontario Government, and when the license of the 22nd of July, 1885, was issued to the plaintiffs, even if they had not had any previous licenses, the defendants at once became wrong-doers as against the plaintiffs; and all the cutting and other work done upon the land from that day to the 30th of April, 1886, was actionable wrong to the plaintiffs. From that day the timber and the possession of the land rightfully belonged to the plaintiffs, and they might have brought the present action at any time after.

If I am right then in my conclusion that the damage in this case continued as long as the defendants remained upon the land, the plaintiffs are in any case entitled to recover all the damage which was done during the currency of the last license, and in any view the judgment should have been for the plaintiffs for all damage done on and after the 22nd of July, 1885.

But I think also that the plaintiffs ought not to be limited in their recovery to the damage during the period covered by the last license, and that the breaks between the licenses may be bridged over successfully in their favour.

The statute relating to the sale and management of timber on public lands authorizes the Commissioner of Crown Lands, or any officer or agent authorized by him, to grant licenses "subject to such conditions, regulations, and restrictions as may from time to time be established by the Lieutenant-Governor in Council, and of which notice may be given in the *Ontario Gazette*."

This has been the law ever since 1849, 12 Vic. ch. 30, and it has been re-enacted several times in the same terms.

Regulations have been made from time to time by the Governor in Council, and published in the *Gazette*, the first of such regulations having been made on the 5th of

Judgment. September, 1849, and published in the *Canada Gazette* of that year at pp. 698-9.
MACLENNAN
J.A.

From the beginning one of the regulations has been that the license holders who have complied with all existing regulations shall be entitled to a renewal of their licenses.

The regulations under which the plaintiffs' licenses were issued were made on the 16th of April, 1869, and were published in the *Ontario Gazette* of the 1st of May in that year.

They require the limits to be explored and valued by the Department, and then to be offered for sale by public auction at the upset price fixed by the valuation, and to be sold to the highest bidder for cash. Besides the original purchase money, the limits are subject to an annual ground rent of \$2 per square mile, payable in advance before the issue of any original or renewal license. The licensee is also to pay certain dues to the Crown in respect of the timber which he cuts upon the limits. The licenses are to expire on the 30th of April in each year, and all renewals are to be applied for and issued before the first of July following, in default whereof the right of renewal shall cease, and the berth shall be treated as forfeited, and no renewal shall be granted unless or until the ground rent and all costs of survey, and all dues to the Crown on timber cut under and by virtue of any license other than the last preceding, shall have been first paid.

Now, looking at these regulations, I think it is clear that the plaintiffs bought and paid full value for the timber on these limits, for it must be presumed that before the license of the 5th of July, 1883, the limits were appraised by the Department, and put up at their full value at auction, and were bought by the plaintiffs, and paid for in cash. They then got a license for a year, or rather for a period extending from the 5th of July, 1883, to the 30th of April, 1884. They also got, by virtue of the statute and timber regulations, a right of renewal from year to year as long as they required, to enable them to remove the timber which they had bought.

They might forfeit this right in various ways, but until forfeiture the right continued. Forfeiture will not be presumed, and the licenses were renewed in fact. The presumption must be that the renewals were in due course, and that the right of renewal never ceased, but continued during the intervals. The plaintiffs having bought and paid full value in the first instance, it would require some formal act of the Department to deprive them of their property as for a forfeiture.

Now I think that the entry by the defendants, and the cutting of the timber by them during the interval between two licenses, and while the plaintiffs' right of renewal existed unimpaired, and in full force, was an actionable invasion of the plaintiffs' rights, which would have been restrained by injunction, and recompensed by an award of damages. Under the old practice the aid of the Court of Chancery would have been required, either to prevent the defendants from setting up the want of license as a defence to an action of trespass, or an action on the case, or by way of injunction and enquiry as to damages. Under the new practice, however, the remedy, like the injury, is the same both for the period actually covered by the licenses and the intervals of time between them, the right invaded being the same in both cases: C. S. U. C., ch. 12, sec. 27; 28 Vic. ch. 17, sec. 3; R. S. O. (1877) ch. 40, secs. 39, 40; Ontario Judicature Act sec. 17, (8); Maclellan's Judicature Act, pp. 29, 31, 32; Joyce on Injunctions, 2nd ed. p. 64.

It was always the practice of the Court of Chancery in this Province to take notice of, and to give effect to rights of property depending on the faith of the Crown. An instance of this, out of many, is *Craig v. Templeton*, 8 Gr. 483, decided thirty years ago, in which a widow was held entitled to dower out of unpatented lands, the learned Vice-Chancellor Esten saying he thought the infallible justice of the Crown was equivalent to the right to specific performance in ordinary cases.

I think, too, that if necessary, the possession of the plaintiffs under the first license ought, as against the

Judgment.

MACLENNAN

J. A.

Judgment. defendants who were mere wrong-doers and had no pre-
MACLENNAN tence of title, to be deemed to have continued during the
J.A. intervals so as to make the defendants trespassers as
against them during the whole period : Pollock on Torts,
312.

For these reasons I humbly think the plaintiffs entitled to recover for all damage, including the cutting of the timber both upon the line of the railway proper, and upon the adjacent belts, and that the appeal should be allowed.

*The Court being equally divided the
appeal was dismissed with costs.*

MARSHALL V. McRAE.

Master and servant—Wrongful dismissal—Right to dismiss—Grounds of dismissal—Exercise of right—Forfeiture of property.

The plaintiff, who was the inventor of a certain machine and had assigned certain patents therefor to the defendant, agreed to obtain patents for certain improvements made by him thereon, and to assign them to the defendant as soon as obtained, who in consideration thereof agreed to employ the plaintiff for two years from the date of the agreement for the purpose of demonstrating and placing the patents on the market, and to pay him a certain sum for salary and also his expenses, and the plaintiff and defendant were to share the profits in certain proportions. The tenth clause of the agreement was as follows:—"It is further agreed that the party of the first part (the defendant) is to be the absolute judge as to the manner in which the party of the second part (the plaintiff) performs his duties under this agreement and shall have the right at any time to dismiss him for incapacity or breach of duty, in which event the party of the second part shall only be entitled to be paid his salary up to the time of such dismissal, and shall have no claim whatever against the party of the first part."

The defendant dismissed the plaintiff within three months of the date of the agreement for alleged disobedience and incapacity, without communicating to the plaintiff his reasons for so acting or calling upon him for any explanations:—

Held, [Hagarty, C. J. O., dissenting] that the plaintiff having certain rights of property under the agreement the parties to it did not occupy merely the relation of master and servant, and that under the tenth clause the defendant occupied a quasi-judicial position and had no right arbitrarily to dismiss the plaintiff but was bound to act in good faith and to enquire into the circumstances upon which he based his determination to dismiss, this necessarily involving notice to the plaintiff and an opportunity of being heard.

Russell v. Russell, 14 Ch. D. 471, distinguished.

Judgment of the Queen's Bench Division, 16 O. R. 495, affirmed.

THIS was an appeal from the judgment of the Queen's Bench Division, reported 16 O. R. 495. Statement.

The plaintiff had invented a crimping machine, the patent for which he had assigned to the defendant. Subsequently he made certain improvements upon this machine and entered into an agreement with the defendant, on the 2nd of February, 1886, in which he agreed to assign to the defendant, in consideration of certain benefits, the patents of invention for improvements then held by him, and any other patents that he should thereafter obtain.

The following were the material clauses of the agreement in question:—

"3. Forthwith after the granting of such letters patent,

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or any letters patent hereafter granted, the said Thomas Tinnock Marshall shall execute to the said John A. McRae an assignment, in due and proper form, of all such letters patent granted, or at any time hereafter to be granted, whether for improvements or otherwise, and the said assignment shall contain a covenant on the part of the said Marshall not to do, or assent to, or cause to be done, any act, deed, matter, or thing whereby the said letters patent, or any of them, shall be forfeited or invalidated.

4. In consideration whereof the party of the first part hereby agrees to employ the party of the second part for the term of two years from the date hereof, for the purpose of demonstrating and placing the said patents of invention granted, or hereafter to be granted, on the market, on the following terms, viz.—The said John A. McRae covenants to pay the said Thomas T. Marshall the sum of \$100 per month during the said term of two years, payable monthly, and in addition to said salary the party of the first part covenants and agrees to pay the actual travelling expenses and board of the party of the second part. And it is further agreed between the parties hereto that the said Thomas T. Marshall shall be entitled to and receive twenty per cent. of the actual net profits that are derived, in any way whatsoever, from the sale or otherwise of the said patents of invention.

5. That the said party of the first part shall cause to be kept proper books of account, and entries shall be made therein of all such matters, transactions, and things as are usually kept and entered in books of account, and all the costs, charges, and expenses in connection with the purchase of the said patents of invention by the said McRae, and of the obtaining assignments thereof, and all the costs, charges, and expenses in connection with the obtaining of further or other patents of invention, and any renewal or renewals thereof, and all the costs, charges, and expenses in connection with the demonstrating and placing the said patents of invention on the market, including the said salary of the said Marshall, and all losses arising in any

way in connection with the said patents, shall be a first Statement. charge on the profits that may hereafter be derived from the said patents and shall be first deducted before any division of profits shall take place or be made.

6. That the said John A. McRae shall be absolute judge of what are expenses and what are not, and shall have the exclusive control and management of all matters in connection with the said patents and the party of the second part simply being his agent for the purposes aforesaid.

7. That the said John A. McRae shall, in the event of said business not proving a success, have the right to cancel this agreement at any time after the expiration of six months from the date hereof if he shall deem it advisable so to do, by paying the party of the second part all salary which may be due up to the date of such cancellation, and his share of the profits, if any, on the basis aforesaid.

8. That the said Thomas T. Marshall shall devote his whole time and attention to the business of the party of the first part, and shall neither directly nor indirectly engage in any other business, occupation, or employment, and that he shall be faithful to the said McRae in all his transactions and dealings.

* * * * *

10. It is further agreed that the party of the first part is to be the absolute judge as to the manner in which the party of the second part performs his duties under this agreement, and shall have the right at any time to dismiss him for incapacity or breach of duty. In which event the party of the second part shall only be entitled to be paid his salary up to the time of such dismissal and shall have no claim whatever against the party of first part."

A few months after the making of this agreement the plaintiff and defendant had a dispute as to the manner in which the plaintiff was attending to the experiments in connection with the machines, and the procuring of the patents for the improvements, and the defendant without any notice to the plaintiff summarily terminated the engagement. The defendant contended that he had a right

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to put an end to the agreement at his own discretion, and that the plaintiff had no further interest in the patents or in the profits and no further claim upon the defendant.

The plaintiff brought this action for damages and it was tried before ROSE, J., at Hamilton, on the 23rd of April, 1888, judgment being given in favour of the defendant with costs.

On motion to the Divisional Court this judgment was reversed and judgment was entered in favour of the plaintiff for \$2,350 as damages for wrongful dismissal, and it was also declared that the plaintiff was entitled to receive from, and be paid by, the defendant 20 per cent. of the actual net profits which had theretofore been derived, or might thereafter be derived, in any way, from the sale or otherwise of the letters patent and patented inventions, and a reference was directed.

The defendant appealed, and the appeal came on to be heard before this Court, (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 21st and 22nd of October, 1889.

McCarthy, Q. C., and *J. J. Scott*, for the appellant. There was ample cause to justify the dismissal of the plaintiff. It was his duty to make such tests as should be directed by the defendant, and without excuse he refused to obey the commands of the defendant and resorted to deception so that his dismissal was justifiable. This would be the right of the defendant under the general law governing master and servant, but in the present instance the rights of the defendant are far higher, for under this agreement he is made the absolute judge as to the conduct of the plaintiff and he might dismiss the plaintiff even capriciously or harshly so long as he did not act in bad faith. He was not acting as a judicial tribunal but was exercising an absolute discretion and it was unnecessary for him to formulate any charge or call upon the plaintiff for any explanation or defence: *Russell v. Russell*, 14 Ch. D. 471. Here the plaintiff had no interest or property in the

patents. As part of the remuneration for his services he Argument. was entitled to a certain percentage of the profits, but this he was entitled to only so long as he fulfilled his engagement and obeyed the commands of his master the defendant, and the engagement having been validly terminated by the defendant the right of the plaintiff to remuneration is at once put an end to and he has now no further interest in the patents or profits.

Moss, Q.C., and Carscallen, for the respondent. Clearly under the agreement the plaintiff was entitled to one-fifth of the profits and this is equivalent to saying that he has a one-fifth interest in the improvements and the patents themselves. The plaintiff, therefore, was not a mere servant in the ordinary sense and there was no right to dismiss him so as to work a forfeiture of his interests in these patents and improvements. Nor was there anything to justify the dismissal of the plaintiff even assuming that the mere relationship of master and servant existed between himself and the defendant. The defendant really was endeavouring to use as an excuse for the dismissal of the plaintiff his dissatisfaction with the working of the machine. That was not a ground for dismissal though it might have been a ground for rescission or damages. Then the defendant has not acted in good faith but has really endeavoured to oust the plaintiff in this manner so as to obtain for himself the whole profits. The plaintiff should at least have been called upon for an explanation and have been given an opportunity of explaining. *Russell v. Russell*, 14 Ch. D. 471, is really a decision in favour of the plaintiff. In that case the articles of partnership in question gave power to determine the partnership but gave no right to take away any interest. There was nothing in that case involving property or reputation, but merely the ordinary power to determine a partnership. If the defendant had heard the plaintiff's explanation and had decided in good faith it might be that the Court could not review that decision, but it is clear that where the right of dismissal depends upon a question of conduct then an

Argument.

opportunity of explanation must be given: *Fisher v. Keane*, 11 Ch. D. 353; *Blisset v. Daniel*, 10 Ha. 493; *Steuart v. Gladstone*, 10 Ch. D. 626.

McCarthy, Q.C., in reply.

March 4th, 1890. BURTON, J. A.:—

I am of opinion that the judgment appealed against is right and should be affirmed.

The case of *Russell v. Russell*, 14 Ch. D. 471, is, I think, very distinguishable. If the defendant had exercised the right given to him under paragraph 7 of the agreement, after the expiration of six months, he would probably have brought himself within the principle of that decision. He was to be the sole judge for himself of whether the business was proving a success, and might, under the powers there reserved to him, have exercised his discretion capriciously and there would have been no obligation upon him to act as a tribunal or to state the ground on which he decided.

Nor do I doubt that if the parties had chosen to enter into an agreement by the terms of which the defendant would have been empowered absolutely and unconditionally to terminate the hiring at will with or without cause, it would have been our duty to give effect to it, however unreasonable the dismissal might have been.

But paragraph 10 does not give the defendant a right arbitrarily to dismiss the plaintiff, but only for "incapacity or breach of duty," and although it is true that it is provided that he is to be the absolute judge as to the manner in which the plaintiff has performed his duties under the agreement, still, looking to the nature of the contract, which was not one of simple hiring, but was a joint adventure in which the defendant merely advanced the wages in the first instance, the same being a first charge upon the profits, he occupied a quasi judicial position, and was bound to enquire into the circumstances on which he based his determination to dismiss, which of course involves a notice to the opposite party and an opportunity of being heard.

I agree, therefore, in thinking the dismissal was not warranted, and that the judgment below should be affirmed.

Judgment.

The damages have apparently been assessed on a very liberal scale, but no appeal was made on this ground nor was it argued before us.

BURTON
J.A.

OSLER, J. A.:—

I think it plainly appears upon the agreement of the 2nd of March, 1885, that the employment of the plaintiff for two years on the stipulated terms was a material part of the consideration for the transfer of the patents which were thereby assigned and of the others which were thereafter to be obtained and assigned in like manner by the plaintiff to the defendant.

The fourth and fifth clauses of the agreement shew that the plaintiff had a further and substantial interest in his employment beyond the agreed salary, in connection with the right to one-fifth of the net profits, which might be derived from the sale or other disposition of the patents. He had purchased the right, precarious as it was, in view of the power conferred upon the defendant by the tenth clause of the agreement, of demonstrating the value of his patents for two years and of selling them and earning thereby the stipulated profit; and although, as I read the agreement, his right to profits is not dependent upon his employment, yet it was no small advantage that he should himself be able at the defendant's expense in the first place (for all expenses, including salaries, and therefore, I presume, the damages recovered in this action are ultimately made a first charge upon profits) to demonstrate to the public for two years the value of his own inventions. If the relation of the parties under this agreement was that merely of master and servant with a summary power of dismissal for breach of duty of which the employer was to be the absolute judge, the plaintiff could not I think recover. If, on the other hand, the plaintiff acquired under it, as I think he did, rights of a more extensive character than those which attach to such a relation, then,

Judgment. although the defendant was constituted supreme judge of what amounted to a breach of duty, he was bound to exercise his power in good faith and not without first giving the plaintiff an opportunity of explanation. Though absolute judge he was bound to proceed judicially, as the effect of what he proposed to do would be to deprive the plaintiff of so much of the consideration for the assignments, then and thereafter to be made, as was represented by the two years' employment and the profits which might have been made by his own exertions during that time out of sales of the patents in which he was interested.

OSLER
J.A.

The cases of *Blisset v. Daniel*, 10 Ha. 493, and *Wood v. Woad*, L. R. 9 Ex. 190, appear to me to contain principles which govern this case, and I regard that of *Russell v. Russell*, 14 Ch. D. 471, as distinguishable. The power given there was: If at any time the business shall not be conducted or managed, or the results shall not be to the satisfaction of the said W. A. R., it shall be lawful for the said W. A. R. to give a three months' notice in writing of his desire to determine the partnership. That, as Sir George Jessel, M. R., observes, was a power given to a single person which could be exercised capriciously if he thought fit. That was the sole ground of the decision, and, to paraphrase the language of the Master of the Rolls, it disappears when you have a power given even to a single person (as here), which could not be exercised capriciously. I concur generally in the opinion of Street, J., in the Court below, but I think the judgment should be varied by confining it to the damages for dismissal. The claim for an account was abandoned at the trial and is no part of the relief sought on the motion against the judgment. I think no case was made for a decree in that respect, involving an expensive enquiry without the prospect, so far as appears, of any present advantage to the plaintiff. I must add, however, with regard to the damages assessed, that no complaint has been made in respect of them. The judgments below do not deal with the amount, and as there is nothing before us from which we see how they were assessed at so large a sum, it must be presumed that the parties were satisfied with them.

MACLENNAN, J.A.:—

Judgment.

MACLENNAN
J.A.

After the most careful consideration which I have been able to give to this case, and notwithstanding the able arguments of the counsel for the appellant, I have come to the conclusion that the judgment appealed against is right.

I adopt the reasons for their judgment given so fully by the learned Judges of the Queen's Bench Division, with which I entirely agree, with a single exception. That exception is, that I think the preparation of the tests required by the defendant was within the scope of the plaintiff's duties as defined by the agreement, and that a neglect or refusal by him to prepare these tests would have been a breach of the agreement. It was most important for the purpose of putting the invention on the market to be able to show what it could do, and the one hundred pairs of uppers which the defendant desired to have prepared on different kinds of leather would have assisted that object. I think the first thing the parties would have had to do in endeavouring to demonstrate and sell the invention would be to shew what it could do, and to have specimens of its work. The defendant had no practical knowledge of the invention, and the inventor was the person he would naturally look to to prepare and to supply him with what he required to enable him to display the results of the invention to those engaged in the shoe trade.

But I think the relation between the plaintiff and defendant, under the agreement, was not the ordinary relation of master and servant.

By the assignment of his new invention to the defendant for their common profit, the plaintiff gave a valuable consideration for his two years employment over and above the services which he was to render, and not only so, but when the profits came to be ascertained the plaintiff's salary, travelling expenses, and board, were to form an item in the expense account, and the defendant was in that way to be reimbursed for those payments out of the common

Judgment. undertaking. In like manner the defendant had the power
MACLENNAN of charging all his own travelling and other expenses to
J.A. the undertaking.

It is further to be observed that, although the language used in the fourth paragraph of the agreement is that the defendant was to employ the plaintiff for two years, &c., and was to pay him a salary and travelling expenses, and board for two years; yet the employment was in an undertaking for their mutual benefit, and for disposing to the best advantage, of property in which they had a joint interest.

Instead, therefore, of its being a case of master and servant, I think the plaintiff and defendant may under this agreement more properly be regarded as both principals who had put their properties together for their mutual profit, but who at the same time had agreed that the judgment of one of them, namely, the defendant, who alone was risking actual money in the undertaking, should prevail in all things, and that he should have the actual control.

Such being the relations, objects, and purposes, of the parties, the defendant is made by the agreement the "absolute judge" of the manner in which the plaintiff performed his duties, and he is to have the right to dismiss him at any time, not capriciously as was the case in *Russell v. Russell*, 14 Ch. D. 471, but for "incapacity or breach of duty." In my humble judgment it is clear that while he was to be "absolute judge" in the matter, he was nevertheless a judge, and was bound to proceed in a judicial manner. Before dismissing the plaintiff it was his duty to enquire, and consider, and determine, whether either of the causes of dismissal specified in the agreement existed, and without such judicial enquiry and determination, and without *bonâ fide* adjudging that one or the other of the specified causes existed, he was not at liberty to dismiss: *Wood v. Woad*, L. R. 9 Ex. 190; *Blisset v. Daniel*, 10 Ha. 493.

I think the learned Judges in the Court below have shewn very clearly that the defendant did not proceed judicially in dismissing the plaintiff, and that he did not enquire, or *bonâ fide* determine, that the defendant was incapable or had been guilty of any breach of duty.

Judgment.
MACLENNAN
J. A.

I think the appeal should be dismissed.

HAGARTY, C. J. O. :—

I am of opinion that the dismissal of the plaintiff from the two years engagement does not involve or affect the plaintiff in his rights to or interest in the property mentioned in the agreement. This appears to have been the view of the learned trial Judge, and I agree with him that the words in the tenth clause, that if dismissed he should have no claim whatever against defendant should be read as limited by the context to refer to a claim under that clause.

The agreement recites the assignment of properties to the defendant and the contract to assign other property when patents are obtained and for the amount of interest the plaintiff is to have in the actual net profits.

All these provisions may stand unaffected by the cessation of the relation of employer and employed between the parties, either on the expiration of the term of service or on its determination under the tenth clause, in either case the plaintiff's rights remain as to the properties.

Nor do I consider that the exercise of the power in the seventh clause, to cancel the agreement at the end of six months, can have a wider effect as to vesting the plaintiff's interest in the property assigned in the defendant.

It cannot be fairly read so that the exercise of the defendant's right to cancel, which might properly refer merely to the two years hiring, should work a forfeiture of all the plaintiff's interest. The payment of salary up to the time of cancelling and his share of the profits, if any, need

Judgment. refer only to the natural result and event of a termination of the hiring contract.

HAGARTY
C.J.O.

The chief importance of determining whether the determination of the hiring involves the loss to the plaintiff of his interest in the profits, &c., is this, that if such consequences arise as the defendant appears by his counsel to think will occur, we would have to apply a much stricter rule of construction to the tenth clause.

I think it would be difficult to uphold a peremptory dismissal if the necessary consequence must be the transferring of what may be valuable properties and interests from the person dismissed to the person dismissing without giving the latter a full opportunity of being first heard in his defence.

On the other hand, if it be a mere severing of the relation of master and servant, or principal and agent, it may be that the words used in this tenth clause are strong enough to support a dismissal by a mere declaration to that effect by the defendant.

The principles governing such a case as this would seem to be found fully discussed in such cases as *Blisset v. Daniel*, 10 Ha. 493; *Wood v. Woad*, L. R. 9 Ex., 190; *Russell v. Russell*, 14 Ch. D. 471.

I can hardly refer to the two first cases in more concise or appropriate words than Jessel, M. R., uses in the third case: (14 Ch. D. at p. 478) "*Wood v. Woad* was, in effect, this: there was rule which allowed a committee of a mutual insurance society to expel a member, and the ground was that if the committee should at any time deem the conduct of any member suspicious, or that such member is for any other reason unworthy of remaining in the society, they shall have full power to exclude such member. Consequently by excluding him the committee declare to the world, to all his neighbours and friends * * that they deem his conduct suspicious, and for some reason that he is unworthy to remain in the society. By the very act of excluding him they cast a stigma upon him. * * * That was, in fact, a decision, not merely depending upon

opinion, but depending on enquiry. No one could suppose it was left to the caprice of the members of the committee to stigmatize as dishonourable or dishonest any member of the society. Of course it was not. It was intended that they should be satisfied by something like reasonable evidence that his conduct was unworthy. Therefore, in construing the rule, the Court of Exchequer rightly came to the conclusion that it was a case in which the committee ought not to have decided until after enquiry.

“As regards *Blisset v. Daniel*, that was a very peculiar case. The case there was this: a majority of the partners consisting of two-thirds wished to expel a partner, and nothing more, but if they did expel him, the other partners had the right to buy up his shares in a particular way by valuation. All the Vice-Chancellor decided was this, that in a case of that kind they had no right to expel merely for the purpose of buying up the shares, and that it was not a fair and *bonâ fide* exercise of the power. He decided that the partners were not to meet together and say: ‘We should like to have so and so’s shares, and therefore we will expel him.’ That was a consequence of the expulsion, but it was not to be the motive of the expulsion—it was not a *bonâ fide* exercise of the power. Then they alleged that they had grounds of dissatisfaction with the partner, but his reply in effect was: ‘If you have any ground of dissatisfaction you ought to have given me notice to see if I had anything to answer.’”

In *Russell v. Russell*, two brothers and a third were co-partners, and there was a provision in the articles that if at any time during the partnership the business thereof should not be conducted or managed, or the results thereof should not be to the satisfaction of the said W. A. Russell, it should be lawful for the said W. A. Russell to give a three months’ notice in writing to the others of his desire that the partnership should determine, &c., &c., and in such case the partnership should cease, &c., &c., in three months, &c.”

The Master of the Rolls says:—“In the case of a single partner it is plain that neither *Blisset v. Daniel* nor *Wood*

Judgment.

HAGARTY
C.J.O.

Judgment.

HAGARTY
C.J.O.

v. *Wood* has any application, because the moment you give the power to a single partner in terms which shew that he is to be sole judge for himself, not to acquire a benefit, but to dissolve the partnership, then he may exercise that discretion capriciously, and there is no obligation upon him to act as a tribunal, or to state the grounds on which he decides for himself. * * The sole ground of the other decisions, that it was a power given to a number of persons not to be exercised capriciously, of course disappears when you have a power given to a single person which could be exercised capriciously."

It is said in the last edition of Smith's Master and Servant, p. 139, "The question in what case and upon what grounds an employer has the right to discharge a person employed by him has only been considered in modern times and is not fully settled," and language to that effect of Parke, B., is referred to in *Lomax v. Arding*, 10 Ex. 736.

The question in the present case seems to me to rest on the words of the contract between the parties on that express point. On this branch of the case the plaintiff charges that the defendant wrongfully dismissed him without due or sufficient cause. If this statement were simply in issue, the sufficiency of the cause of dismissal would have to be determined, but the defendant insists that the subject of dismissal is expressly provided for in the contract.

[The learned Judge read the paragraphs of the agreement above set out and continued :]

The defendant at the time of the agreement already owned, by purchase, the larger share in the patents then obtained. Since then others have been obtained.

It will be seen that the defendant, who was the monied man in the dealings, was placed by the terms of the contract as complete master of the whole of the business,—of the courses to be adopted, of the expenses to be incurred—in fact of everything involving expenditure, &c.

As already said I consider the contract of hiring as wholly distinct from the respective rights and interests of

the parties in the property, existing or to be acquired, and that the severing of that connection leaves the plaintiff's rights to obtain an account and benefit of the profits untouched. And I fully agree with the trial Judge that the clause in section 10, as to "no claim whatever," is confined to claims in respect of that connection.

If we discuss the sufficiency or insufficiency of the cause of dismissal it seems to me we are ignoring the plain words of the contract. If it be proper for me to discuss that question I am bound to say that I agree with the trial Judge, that the evidence does not disclose a total want of such cause, and that the defendant is not without apparent reason for availing himself of the power of dismissal. We have not been referred to any case in which a provision of this character, vesting such large power in the employer, is to be found.

As I think the plaintiff is not deprived of any property or interest in the patent rights, it seems hardly necessary to apply the principles set out in the cases cited which govern the master's right to dismiss. The plaintiff contracts that the defendant is to be the absolute judge as to the plaintiff's performance of his duties, and may dismiss him at any time for incapacity or breach of duty.

In the letter to the plaintiff, by the defendant's solicitor, the cause is stated as disobeying instructions in many particulars, and not dealing fairly with him according to the agreement. The reason thus assigned would include and fall within the words "breach of duty" in the agreement, and "the performance of his duties."

I do not consider I have any right to discuss the sufficiency of the alleged causes. Nor do I see my way to declaring that the defendant was first bound to notify the plaintiff and hear what cause he had to shew against the defendant acting on this tenth clause. I do not think that anything turns on the objection that the plaintiff was not bound under the contract to do the work as to testing the machine, as to which the defendant expressed so much dissatisfaction.

Judgment.

HAGARTY
C.J.O.

Judgment.

HAGARTY
C.J.O.

Is there any substantial distinction between the clause in *Russell v. Russell*, 14 Ch. D. 471, and that before us? There the power was to dissolve by notice if the conduct of the business or its results were not to the satisfaction of the defendant. Here the appointment of the defendant as the absolute judge of the manner of the plaintiff's performance of duties seems, at least in my judgment, to vest as large a power in the latter case as in the former.

If we lay stress on the words "incapacity or breach of duty," then we ignore this large power and make what the defendant chose to consider amounted to either one or the other to depend on our approval or disapproval of the soundness of his view. I think we would thus defeat the plain language of the bargain.

After reviewing the evidence the learned trial Judge thus remarks:

"Now am I to say that when these facts come before the defendant,—as to which minds may differ and upon which if I had to determine whether or not the plaintiff had neglected his duty I should require time for consideration—am I to say, when the plaintiff has constituted the defendant the absolute judge as to the manner in which he, the plaintiff, has performed his duties, that I am to constitute him a qualified judge, or a judge whose decision is to be subject to revision by me, and if I believe that these acts do not amount to a breach of duty I am to reverse his decision and say that he has erred in the judgment to which he has come? I have no doubt that it may be open to the observation that the defendant did not approach this adjudication with an unbiased mind, suspicions may have been engendered by false statements, by misapprehension of facts, by an irritation consequent upon the investment of money without a speedy return. It may be that all these things would not have led one to have chosen him for a judge under the circumstances, but it must be concluded that the plaintiff felt the difficulties of the position when he objected to the provisions of the clause, and when in view of the possibilities of his having

difficulty he chose to enter into that agreement, it is not in my power, sitting here, to relieve him from its terms. I feel therefore it is not open for me upon these facts to declare that there has been no breach of duty on the part of the plaintiff, or that the defendant has acted fraudulently and has made use of this clause in order to get rid of the plaintiff because he has behind his action a determination to commit a fraud or do a wrong to the plaintiff."

My examination of the evidence leads me to agree in the view of the Judge who had both the parties and their witnesses before him.

The judgment in the Queen's Bench holds that it was incumbent on the defendant to shew satisfactorily that he exercised the power with entire good faith.

With much respect I must say that this construction would wholly destroy the provisions as to the defendant being the absolute judge of the matter. He certainly could not be so under this limitation.

It was perhaps not very unreasonable for a man so to insist when all the heavy expenses had to be borne by him and where he had bargained for exclusive control over everything.

The plaintiff remains entitled to all his reserved interests in the profits of the adventure, the conduct of which has been expressly left in the defendant, and he is entitled to an account on laying a proper foundation therefor.

For some reason, satisfactory I presume to himself, although unintelligible to me, the defendant has neither in his reasons of appeal nor in argument objected to the amount of the damages for dismissal or the basis on which they were awarded.

I understand that it is not disputed by my learned brothers that the defendant could have dismissed the plaintiff after calling on him for explanation as to the matters complained of by the defendant, and after hearing his answer, if any, and that from that decision there would be no appeal.

In estimating the damages sustained by this dismissal,

Judgment.

HAGARTY
C.J.O.

Judgment.

HAGARTY
C.J.O.

the nature of the plaintiff's tenure of office, depending solely on the defendant's final judgment, would naturally be considered. If within a day, a week, or a month, of this irregular dismissal, he had it in his power to effect the same regularly, such a state of facts should, as I understand the law, have been considered. The plaintiff has been awarded the full amount of salary to the end of the two years.

The judgment below awards \$2,350 in bulk for damages. Nothing appears as to a claim for board, nor was any construction put upon the fourth clause as to board. It has apparently been allowed for all the time, and no question raised as to its being confined to board when travelling.

It is a most singular assessment of damages, but as the defendant does not seem to have objected it cannot now be interfered with.

Appeal dismissed with costs,
HAGARTY, C.J.O., *dissenting.*

DAY V. DAY.

*Fraudulent Conveyance—Intent to defeat creditors—Secret Trust—
Evidence—Pleading.*

If a defendant wishes to set up in answer to an action to declare him a trustee of land the defence that the land was conveyed to him for a fraudulent purpose he must in his pleading specifically say so, and admit his own criminality in joining in a criminal act.

If the plaintiff can make out his case without disclosing the alleged fraud, the defendant will not be allowed to show, as a reason why the plaintiff should not recover, the fraud in which the defendant himself participated.

Judgment of FERGUSON, J., reversed.

This was an appeal by the plaintiff from the judgment Statement. of FERGUSON, J.

One Solomon Day died intestate some time in the year 1841, leaving his widow and seven sons and one daughter surviving him. He was possessed of a number of farms, and the land in question in this action was his homestead or part of it. In his life time, he had given farms to his two eldest sons John and Isaac, but on his death all his lands descended to his eldest son John. The land in question had never been patented, and there was a balance due to the Crown. After the death of her husband, the widow, apparently with the consent of all the family, made a distribution of the farms among the sons, which had never been disturbed or questioned by the heir-at-law, under it the farm in question being allotted to the plaintiff, and another farm to the defendant. No deeds appeared to have been executed, but all parties took possession of their respective allotments. The widow died in 1847. From the time of this allotment up to the 5th of January, 1858, the plaintiff occupied the land in question, personally for several years, and for several years by tenants. The plaintiff's land had been allotted to him upon the understanding that he was to pay the balance of purchase money due to the Crown; and also apparently upon the further understanding that he should take care of his sister, who was a widow with several children. Some time in 1857, the plaintiff put his sister and her family in possession, and

Statement. she was in possession in January, 1858, when the plaintiff conveyed the land to the defendant, for an expressed consideration of \$5,000. At the date of this deed the plaintiff was keeping an hotel in Brantford, and owed some debts for which he was being sued, and several judgments were about that time or soon after recovered against him, amounting altogether to \$800 or \$1,000.

The defendant admitted that there was no sale for \$5,000 such as the deed expressed; that the \$5,000 was never paid or intended to be paid, but that the property was to be held by him in trust for the plaintiff. After the making of the deed, the plaintiff remained in possession, according to the admission of the defendant, for three or four years at all events, and the evidence shewed that either by his sister and her family, whom he had put in possession, or by his tenants, the plaintiff remained in possession until the fall of 1872.

The defendant admitted that he was trustee for the plaintiff until 1873, but said that in that year he was embarrassed by executions arising out of a litigation in the interest of the plaintiff, and that the plaintiff told him he could take this property and use it, and that the plaintiff would have no demands on it. This was denied by the plaintiff, who said that the expenses and claims referred to were all paid by him or out of his property.

From 1873 to 1886 the defendant was in possession by his tenants, and there was no satisfactory evidence that he accounted to the plaintiff for any part of the rent during that time.

On the 2nd of May, 1885, the defendant made a lease of the property for two years, ending 26th January, 1887, to one Dennis Legacy, at an annual rent of \$1,200. In October, 1886, the plaintiff got possession from Legacy, and had since been in occupation with his wife and family, and Legacy had removed from the place.

The plaintiff said Legacy gave up quiet possession and went away without any consideration, and this was corroborated by the plaintiff's wife. Legacy on the contrary said

the plaintiff agreed to pay him \$50 for the remainder of Statement. his term.

The action was tried before FERGUSON, J., at Brantford, on the 15th of November, 1887, and the learned Judge reluctantly decided in favour of the defendant, on the ground that the instrument of the 5th of January, 1858, having been made by the plaintiff to hinder and delay creditors, the Court could give him no assistance to get back his property. The defendant, moreover, having counter-claimed for possession of the property, the learned Judge ordered the plaintiff to deliver possession to him.

The plaintiff appealed and the appeal came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A.) on the 9th of January, 1889.

Hardy, Q. C., for the appellant.

J. W. Bowlby, for the respondent.

March 5th, 1889. HAGARTY, C. J. O.:—

The plaintiff, in seeking to enforce a trust in his favour, as to the lands, so far from admitting that the deed had been executed for the fraudulent purpose of defeating and delaying creditors, expressly denied and disclaimed any such design, stating that he had sufficient property to pay all his debts and that they had in fact been paid.

The defendant did not in his defence to the claim urge any such fraudulent design or purpose, but admits distinctly that up to 1873 he did hold the land in trust, and that then the plaintiff abandoned all further claim thereto, and he claims the benefit of both Statute of Frauds and of Limitations.

The plaintiff did not come into Court admitting the taint in the assignment; all the suggestions thereof come from the defendant.

If the plaintiff's counsel had objected, I do not see how such a defence could have been heard when not pleaded, nor should the learned Judge have received it.

Judgment.

HAGARTY
C.J.O.

As said so pointedly in *Haigh v. Kaye*, L. R. 7 Ch. 469, "If a defendant means to say that he claims to hold property given to him for an immoral purpose, in violation of all honour and honesty, he must say so in plain terms, and must clearly put forward his own scoundrelism if he means to reap the benefit of it. Here he has simply said that the plaintiff, fearing an adverse decision in the suit of *Haigh v. Haigh*, conveyed the property to him. I think that is not sufficient."

This was not a decision on demurrer, but an appeal from a final decree, apparently on hearing, in the Rolls.

In any event when the evidence was admitted, it should be borne in mind that the whole burden of proof was on the defendant, and he should have been held to very strict proof. The plaintiff had merely admitted that there were claims against him to less than \$1,000, all of which had been paid.

The defendant says in his evidence that he took the conveyance at the plaintiff's request to save it from his creditors.

The whole alleged proof of the evil intention is the admission of debts, and this statement of the defendant.

No proof whatever was offered of any creditor being delayed, much less defeated, or that any one remained unpaid.

I do not consider that the existence of debts, at all events in the case of a man possessed of other property, should of itself ever be held sufficient evidence to avoid a voluntary conveyance.

Coupled with the defendant's very doubtful and unsatisfactory statement, in direct contradiction of the plaintiff, I do not think the decree warranted by the evidence. I am most anxious to respect the finding of the learned trial Judge on any mere questions of fact.

The lapse of nearly thirty years, the total absence of evidence of any improper effect on creditors, or of any continued or existing failure to meet or pay debts, and the very peculiar manner in which this case was presented in both pleadings and evidence, seem to me to take it out of

the ordinary rule on this point, and leave it more as a legal question.

Judgment.

The plaintiff does not ask the Court to give him any aid or advantage, through, or in consequence of, any fraud he has committed.

HAGARTY
C.J.O.

If the defendant had been asking the aid of the Court in any way to better his title or to remove any legal obstacle his evidence here would disentitle him to its aid. He would be claiming aid to a title tainted from its inception.

I am of opinion that he was not entitled to the order for restitution of the possession obtained by the plaintiff of the lands. It is unfortunate that the case at the trial was not presented to the Court more distinctly.

The Judge's attention was not directed to the point that the pleadings disclosed no defence such as has been allowed to prevail. It would rather seem from the following that it was assumed they did so.

[The learned Judge quoted certain portions of the notes and continued.]

Such a defence must have been pleaded, and as far as we can understand *Haigh v. Kaye*, L. R. 7 Ch. 469, (especially in the fuller report in 26 L. T. N. S. 675), after the hearing and decree on the merits at the Rolls the Lord Justice makes the remarks already cited, as to the necessity of stating the fraudulent transaction and the defendant's participation in it.

That case would seem to warrant the idea that the objection can be considered in an appeal on the merits after trial without such a point being previously raised, but it is not necessary so to decide. There may be good reason for requiring a party claiming to hold the property of another on the *potior conditio possidentis* principle, to specially elect to admit his own criminality in joining in a criminal act.

As to the Statute of Limitations raised before us, and below, the trial Judge does not find on the point.

Such a defence cannot avail here. The whole title remains still in the Crown.

Judgment.

HAGARTY
C.J.O.

In addition it may be noted that the defendant expressly admits the trust up to 1873, and during its existence writes to the plaintiff a letter in November, 1872, in which he tells him that he has rented the old farm to Wicliff for five years at \$200 a year, payable half yearly, and that he was to take possession of it on 1st April next; that he has paid out a great deal of money this year: that he runs no bills, and thinks he will make some money the coming winter. This letter from trustee to *cestui que trust* informs the latter of the renting of the land in dispute for a five year term. The plaintiff appears to have made no objection to this arrangement, so that we may fully assume the tenant to enter with his knowledge of and assent to his trustee's arrangement. This tenancy would last into 1879, to within six or seven years of the bringing of the suit.

I can hardly see how the *cestui que trust* during that holding could be held to be barred of any right of entry or otherwise under the Statute.

As I think the defence fails on the merits I do not feel it necessary to enter upon a discussion as to the effect of a deed originally executed with a fraudulent intention, but apparently never acted upon or having in any way defeated or delayed any creditor.

The point has been fully discussed by the learned Chancellor in *Mundell v. Tinkis*, 6 O. R. 625, and I express no opinion on the point. The cases are fully stated there.

It may be well to consider, in deciding whether the evidence warranted the belief that the plaintiff did convey to the defendant to delay creditors, whether the parties could have feared or believed that such an interest as the plaintiff claimed could be sold on execution. The father, the original locatee or nominee of the Crown, died before 1852, intestate. The plaintiff was not heir-at-law, and had no written claim or title from any one. It was only under some alleged oral family arrangement that he claimed.

BURTON, J.A.:—

Judgment.

BURTON
J.A.

The plaintiff brings his action for the purpose of having it declared that an assignment made by him to the defendant many years ago, purporting to be made for a valuable consideration, was in fact voluntary and upon trust for the plaintiff, and seeks a re-conveyance.

The defendant does not in express terms deny the allegation in the plaintiff's statement of claim "that the instrument under which he claims, although absolute in form, was intended to, and in fact was and is, a trust deed," but contents himself with denying that it was intended to be a power to manage the land for the use and benefit of the plaintiff.

Under the present rule of pleading, however, directing that the silence of a pleading as to any allegations in a previous pleading is not to be construed as an implied admission of the truth of such allegation, the defendant is right in his contention that the trust was put in issue and he claims the benefit of the Statute of Frauds.

It is not pretended in the answer that there was any sale, and it is clearly shown upon the evidence that there was nothing in the nature of a sale, and assuming as I do, for the present, that there was nothing whatever illegal in the transaction, it is shown that the conveyance though expressed to be for a consideration of \$5000 was not so in fact; that that sum never was paid or agreed to be paid and the conveyance was wholly without consideration; that the plaintiff remained in actual possession or in receipt of the rents for years afterwards; that he made improvements with the knowledge of the defendant, and that the farm was treated as his by the person to whom this conveyance was made. This was sufficient to let in the parol evidence of the trust, and it then appears that there was an agreement at the time of the deed to re-convey, and the defendant in his evidence admits the trust. This therefore is a case to which the Statute of Frauds does not apply, and I adopt the language of the Master of the Rolls in *Davies v. Otty*,

Judgment. 35 Beav. at p. 213, "That it is not honest for the defendant to keep the land."
BURTON
J.A.

The evidence of the defendant thus establishes the original trust—it is in fact undisputed, and the learned Judge found in the plaintiff's favour upon that point, and the only answer to that expressly raised in the statement of defence is, that in 1873 he abandoned all claims.

There was no plea setting up the illegality now relied on, and my impression is that inasmuch as the plaintiff had succeeded in making out his case without disclosing the alleged fraud, the defendant should not have been allowed to plead it, he being a party to it.

In order to apply the rule *melior est*, &c., governing such cases, it is necessary to consider not only which is plaintiff and which defendant, but whether the fraud is alleged as a defence or as a cause of action; for although it is true in general that the law will not lend its aid to enforce a fraudulent or illegal contract, still if the plaintiff can make out his case without disclosing the alleged fraud, the defendant will not be allowed to shew that he was equally guilty with the plaintiff as a reason why he should not recover.

Thus in *Roberts v. Roberts*, 2 B. & Ald. 367, where the plaintiff at the trial produced a proper deed of conveyance, and proved its execution, and by that established his title to the premises, and the defendant endeavoured to defeat this by shewing that the deed was delivered for the fraudulent purpose of giving to the plaintiff a colourable qualification to kill game, he was not allowed to be heard upon it, no man being allowed to allege his own fraud.

In *Begbie v. The Phosphate Sewage Co.*, L. R. 10 Q. B. 491, the plaintiff was not entitled to recover because he could not present his case to a jury without necessarily disclosing the unlawful purpose in furtherance of which the money was paid.

See remarks of James, L. J., in *Ex parte Ball*, 10 Ch. D. at p. 669: "If a plaintiff can prove his case without proving any illegality he can succeed; it is no answer for the defendant afterwards to prove an illegality." See also

Evans v. Dravo, 24 Pa. St. 62; *Swan v. Scott*, 11 Serg. & R. at p. 164.

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BURTON
J.A.

Applying these principles to the present case:—The plaintiff did succeed in establishing his case, and it was not competent to the defendant in my opinion to meet that by showing an illegality to which he was himself a party. If there had been a written declaration of trust in this case—putting that in would have established the plaintiff's rights—the defendant, in order to defeat that, alleges and attempts to prove the fraud. In respect to that matter—the real substance of the dispute—he is the actor. In attempting to prove it he brings himself within the maxim, that a man is not allowed to allege his own fraud.

If I am right it is not necessary to discuss the question of the admission of the evidence which was admitted without any plea of this alleged illegality upon the record. But even on the assumption that such evidence could be received, I think with great deference it falls far short of what should be required in a case of this kind set up for the first time after the institution of these proceedings, nearly twenty years after the alleged frauds are said to have occurred.

Some judgments were proved amounting in the whole only to about \$1000, but there was no evidence to show that any of them remained unpaid, whereas the plaintiff swears that every one of them was paid. In fact he goes further, and swears that he never contracted a debt which he did not pay, and although his personal property was under seizure for some time it is not shown that even this had to be resorted to for the payment of the claims. The learned Judge at the trial says expressly that he does not prefer the evidence of one brother to the other, but taking the defendant's evidence in connection with the fact that these judgments were proved he must hold the fraudulent intent established.

I do not for a moment dispute that a person may have a fraudulent intent imputed to him to defeat or delay creditors if he denudes himself by a voluntary deed of the principal

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J.A

part of his property and never pays them, but if it is shown that he has other property available for their payment, and does shortly after the execution of the deed pay them, that inference is rebutted. We have a right to accept the uncontradicted evidence of the plaintiff that these debts were all paid and that he had then a considerable amount of personal property. I do not think the evidence of these judgments under the circumstances sufficient to turn the scale; on the contrary it should have supported the evidence of the plaintiff that he was well able to pay his debts.

I am therefore of opinion that the evidence was not sufficient to show a fraudulent intent, and that this judgment should have been rendered for the plaintiff who established the trust.

In this view it is not necessary to consider a point which was not taken upon the argument, but which may be not without weight, viz., that there was no estate or interest in this land which was exigible under execution, and that an assignment therefore of such a description of property could not be fraudulent within the statute of Elizabeth.

I am of opinion that the appeal ought to be allowed and judgment given for the plaintiff, and the defendant ordered to reconvey the lands, and to account for the rents and profits received.

OSLER, J. A. :—

I do not see my way to reverse the judgment so far as it stands upon the facts of the plaintiff's indebtedness at the date of the conveyance, and of the intention to defraud creditors. I think there is abundant evidence to support the learned Judge's findings upon both of these points. The appellant relies upon a trust; and that being so, the onus is upon him to show what the trust was: *In re Great Berlin Steamboat Co.*, 26 Ch. D. 616. That was a question of fact and if the trust was what Ferguson, J., finds it,

the plaintiff is necessarily making out his title through the illegal transaction, and is within the rule, *potior est conditio defendantis*. I do not see that at this stage of the case anything can turn upon the omission of the defendant to plead the fraud expressly in his statement of defence; he ought to have done so, and I daresay if this objection had been taken at the trial the evidence would have been excluded, for where a defendant puts forward a dishonest defence he ought, as has been said, to write himself rascal on the record, and against his opponent's objection he shall not be permitted to give evidence of such a defence if he has not pleaded it. But here I am inclined to think that there was no surprise. Both parties seem to have anticipated that some such defence would be entered upon as the learned Judge gave effect to, and therefore the case must be treated as any other case which has been defended without objection on a ground not expressly pleaded. If it be thought the defence is proved, the application to amend the pleading must be allowed.

But a defendant who opposes such a defence to what if it fails is a right and just demand, must make it out very clearly indeed in all its essentials, and here I think he has not succeeded in showing beyond all reasonable doubt that the deed of January, 1858, could have had the effect of defeating any right or interest in the land which could then have been the subject of legal or equitable execution at the suit of any of his creditors. The land was not patented, though I do not rely at all upon that, for if the plaintiff himself had been located by the Crown under the usual contract for purchase, I do not see why his interest in the land could not have been got at by his creditors: *Yale v. Tollerton*, 13 Gr. 302; *Ferguson v. Ferguson*, 16 Gr. 309. The locatee and purchaser was the plaintiff's father, who died intestate before the Act abolishing the right of primogeniture. His interest in the land would therefore descend to his eldest son, who was not the plaintiff. It may be that there was some family arrangement entered into before

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J. A.

the father's death for a division and allotment of the property among his children which would be binding upon the eldest son and prevent him from asserting any claim to this land, and one may surmise from what the plaintiff says that this was probably the case, but the evidence falls far short of establishing it.

If there was nothing but a voluntary arrangement, and the tangible proof does not go beyond that, the conveyance was not one by which any creditor could be defrauded, defeated, and delayed, and there is no principle upon which the plaintiff should not have the relief he asks. On this ground, I concur in reversing the judgment.

MACLENNAN, J. A. :—

I am of opinion, with great respect, that the judgment ought to be reversed.

The learned Judge thought there was nothing to choose between the plaintiff and the defendant in point of credibility, and that leaves us free to form our own opinion upon the question of fraud, and the evidence in support of it, and I am not satisfied that an intention to hinder and delay creditors is made out. There were debts, it is true, but they amounted to no more than from \$800 to \$1,000 altogether, and the plaintiff says he paid them. There is no attempt to shew the contrary—viz., that any one was hindered or delayed.

If the intention had been to defraud, it was a very clumsy attempt. It was in the form of a sale for \$5,000, subject to the debt to the Crown. If he had sold on the terms mentioned in the impeached instrument, the sale of this property alone would have produced five times the amount of all the debts he owed as far as appears. The plaintiff says the deed was made because he was making arrangements to remove to the United States. He did not go then, but he did go some years afterwards; and there is no evidence whatever that he owed anything when he went away. These were the

circumstances, and I think that any unfavourable inference to be drawn from them is rebutted by the fact that the debts were all paid in a very short time: *Jenkyn v. Vaughan*, 3 Drew. at p. 425.

Judgment.
MACLENNAN
J.A.

I am further of opinion that even if the evidence of an intent to defeat creditors had been clear, it ought not to have been admitted, that ground of defence not having been pleaded, and we are bound to disregard it: *Jacker v. The International Cable Co.*, 5 Times L. R. 13.

The learned Judge seems to have been under the impression that it was pleaded, for he insisted that the plaintiff was bound to declare his financial position at the time of the assignment. The learned Judge's attention was not called to the absence of pleading to support the evidence; and I feel certain that if it had, he would have excluded the testimony and would not have given leave to set up the defence as being a furtherance of justice: *Haigh v. Kaye*, L. R. 7 Ch. 469.

At all events, no application to amend or to set up the defence of fraud was made, and the case comes to us without any such defence on the record, and we have to consider it in that state of the pleadings. In my judgment, we are not bound to give effect to a defence which is not pleaded.

How then does the case stand when the transaction is freed from the imputation of fraud? The defendant denies the trust in his defence, but this is done in a very cautious and qualified way; and it was still necessary for the plaintiff to prove it. This is done in the clearest manner out of the defendant's own mouth, but it is not proved by any writing, and the defendant pleads the Statute of Frauds. It may be questioned whether this defence is sufficiently pleaded: *Pullen v. Snelus*, 40 L. T. N. S. 363. But assuming that it is, I think it is no answer to the action. The cases of *Childers v. Childers*, 1 DeG. & J., 482; *Lincoln v. Wright*, 4 DeG. & J., 16; *Davies v. Otty*, 33 Beav. 540; *Haigh v. Kaye*, L. R. 7 Ch. 469; *Booth v. Turle*, L. R. 16 Eq. 182, shew that in the circumstances of this

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MACLENNAN
J.A. case, it is a fraud on the part of the defendant to endeavour to keep this land, and that the Statute of Frauds is inapplicable.

Even if the statute were applicable to such a case, the fact that the plaintiff, according to the admission of the defendant, remained in possession after the making of the deed for at least three or four years, opens the door to the admission of parol evidence, and thus allows the trust to be proved.

The case then resolves itself into one of trust, with this peculiarity, that the legal title was, and is, in the Crown; and the dealings of the parties and the action which has grown out of them, are all in relation to a merely equitable interest.

I think it quite clear that what took place in this family two or three years after the father's death, and now about forty years ago, whereby their father's lands were divided among his sons, each getting a farm, and the present plaintiff getting the land in question, gave to the present plaintiff a good equitable title to the land in question, subject to the purchase money due to the Crown. The defendant clearly never had any interest in it, and the eldest son, who alone could have questioned the arrangement, did not do so.

The title being thus an equitable one, what was the effect of the transaction of 1858, that is, the whole transaction, the writing and the verbal agreement or understanding of the parties? Where a person having the legal title, and also the beneficial interest in land, conveys it upon trust for himself, the legal and beneficial ownership or titles are separated; the legal title goes to the trustee, and the equitable and beneficial ownership remains in the settlor; but when a person who has not the legal title makes such a deed, it is simply of no effect to change the rights of the parties at law or in equity, and their rights remain just what they were before.

In this case the parol evidence does away with the whole effect of the deed of 1858, so far as it purports to

be a sale for value, and all that is left is the authority given to the defendant to complete the purchase from the Crown by paying the government what was due and obtaining the patent deed, which was to be for the benefit of the plaintiff.

Judgment.
MACLENNAN
J.A.

Beyond all question this is the position in which the matter stood until the beginning of 1873. The only circumstance that supports the defendant's contention is, that the tenants from 1873 to 1886 were put on the land by him, and paid their rents to him; and there is no evidence of any payment of or accounting for any of the rent to the plaintiff during that period. This is certainly a strange fact, but in my opinion it is not sufficient in the face of the plaintiff's positive denial to support a plea of abandonment on the part of the plaintiff without any valuable consideration either alleged or proved, of a property worth nearly \$5,000.

Another defence set up by the defendant is the Statute of Limitations. The eighth paragraph of the defence just says the defendant claims the benefit of the Statute of Limitations. The defence nowhere states that the plaintiff has been out of possession, or that the defendant has been in possession for any particular time, nor does it indicate in any way what the facts or circumstances are which make the Statute of Limitations applicable. Looking at the statement of claim there are many ways in which it is conceivable one or other of the Statutes of Limitations might apply, and before effect could properly be given to this defence, I think it would be proper to require an amendment to be made so as to show how it is intended to be applied.

If, however, the statute should be regarded as well pleaded to the action on the ground of upwards of ten years having elapsed since the plaintiff went out of possession, I think there is more than one answer to this defence.

I am of opinion in the first place that by the transaction of 1858, the defendant became an express trustee for the plaintiff within the meaning of the 29th and 30th

Judgment. sections of the statute, R. S. O. (1877,) ch. 108, and section
MACLENNAN 17, (2) of the Judicature Act of 1881, which are the
J. A. statutes which were applicable when the plaintiff obtained
possession from Legacy and when this action was brought.
The trust in this case, though by parol, was neither a
resulting, an implied, nor a constructive trust. It rests
upon the actual express agreement of the parties, and so
in my opinion is an express trust, and is, therefore, not
within the statute. See Darby on Limitations, 183;
Petre v. Petre, 1 Drew. 371; Snell's Equity, 2nd ed., 48;
Burdick v. Garrick, L. R. 5 Ch. 233; *Banner v. Berridge*,
18 Ch. D. 254; *Sands to Thompson*, 22 Ch. D. 614;
Coyne v. Broddy, 13 O. R. 173, and S. C. 15 A. R. 159.

The defence of the Statute of Limitations is also excluded by the circumstance that the legal title is still in the Crown.

If it were necessary to decide the point, I also incline to think that the property in question having been purchased from the Crown, with a balance of purchase money still unpaid when the deed of 1858 was made, was not property within the statute, 13 Eliz. ch. 5, because it could not, as it clearly could not have been, taken in execution: May on Fraudulent Conveyances, 1st ed., 17, 23, 1 Story's Eq. Jur., 13th ed., secs. 367, 368; *Sims v. Thomas*, 12 A. & E. 536.

Upon the whole, I am of opinion, with great deference, that the appeal should be allowed with costs, and that judgment should be entered for the plaintiff with costs.

Appeal allowed with costs.

SINDEN V. BROWN.

Justice of the peace—Summary conviction—Fine—Distress—Part payment—Imprisonment—Notice of Action—R. S. C. ch. 178, secs. 60, 61, 62, 63, 64, 65, 66, 67—R. S. O. (1887) ch. 73, sec. 14.

A commitment for part of the sum adjudged by the conviction to be paid is not authorized by the Summary Convictions Act, and is illegal.

The plaintiff was convicted under the Canada Temperance Act and was adjudged to pay a fine and costs, to be levied by distress if not paid forthwith, and in default of sufficient distress to be imprisoned &c. He paid the costs but not the fine, and a distress warrant was issued against him. Nothing being made under the distress a warrant of commitment was issued under which he was imprisoned :—

Held, that the commitment was bad.

Trigerson v. Board of Police of Cobourg, 6 O. S. 405, approved and followed.

Held, however, that the magistrate having, in the honest belief that he was acting in the execution of his duty as such, issued the warrant of commitment after payment of the costs adjudged, was, though acting without jurisdiction, entitled to notice of action, and that, no notice having been given, the action failed.

Judgment of the Common Pleas Division, 17 O. R. 706, affirmed on other grounds.

THIS was an appeal from the judgment of the Common Pleas Division, reported 17 O. R. 706. Statement.

The plaintiff brought the action against the defendant, who was police magistrate for the town of Simcoe, to recover damages for malicious arrest and wrongful imprisonment. The plaintiff was convicted by the defendant on the 2nd of April, 1888, under the Canada Temperance Act, of selling liquor in violation of that Act, and was adjudged to pay a fine of \$50, and \$6.95 costs, to be levied by distress if not paid forthwith, and in default of sufficient distress to be imprisoned for thirty days unless the fine and costs and subsequent costs were sooner paid. The plaintiff paid the costs to the defendant on the 14th of April. On the 17th of April, a distress warrant was issued to levy the fine and costs, notwithstanding the fact that the costs had been paid, and the constable made his return that there was not sufficient distress. On the 30th of April a commitment was issued which recited the distress warrant and return of no sufficient distress in the usual form, and

Statement.

ordered the plaintiff to be imprisoned for thirty days unless the penalty, costs and charges of the distress, and the costs of conveying the plaintiff to jail, fixed at \$1.75, were sooner paid, nothing being said as to the costs of the conviction. The plaintiff was, under this commitment, arrested and placed in jail.

The action was tried before ARMOUR, C. J., at Simcoe, on the 8th of April, 1889, and the action was dismissed with costs on the ground that the conviction had not been quashed, and that no notice of action had been given, and this judgment was affirmed by the Divisional Court on the ground that a committal for the penalty was valid notwithstanding payment of the costs. The learned Chief Justice also ruled that there was no evidence of *mala fides* to submit to the jury.

The plaintiff appealed, and the appeal came on to be heard before this Court, (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 27th and 28th of November, 1889.

McCarthy, Q. C., and *DuVernet*, for the appellant. It was not necessary to quash the conviction. The conviction was and is perfectly valid, but the plaintiff contends that the mode in which the conviction was enforced was illegal and rendered the defendant liable to an action. The payment of the costs put an end to the right to commit. Payment and imprisonment are alternative punishments, and both cannot be inflicted. If a levy is made the whole penalty must be recovered under the distress or no part of it at all. If a part is levied under the distress, then that part must be returned before any other proceedings are taken: *Trigerson v. Board of Police of Cobourg*, 6 O. S. 405; Oke's *Magisterial Synopsis*, 10th ed., p. 170; Paley on *Convictions*, 6th ed., p. 336; *Rex v. Wyatt*, 2 Ld. Raym., 1195; Burn's *Justice of the Peace*, 13th ed., vol. i., p. 867; *Summary Convictions Act*, R. S. C. ch. 178, secs. 58, 62, 66, and forms N1, N4, and N5; *Moffat v. Barnard*, 24 U. C. R. 498. At any rate in this

case the distress was made for the whole amount of the fine and costs, though the costs had been paid, so that the distress was illegal, and a warrant of commitment founded upon that illegal distress was also illegal, even if there could be in any case commitment after part payment. Notice of action was not necessary. If a magistrate acts without jurisdiction he is not entitled to notice of action unless the acts complained of were done in the honest belief that he was acting within his jurisdiction. Here there was no such belief, and indeed no reasonable ground on which such a belief could be founded. The magistrate knew the actual facts and must be presumed to know the law, so that at best he acted merely under a misapprehension of law, and that is no protection: *Griffith v. Taylor*, 2 C. P. D. 194; *Agnew v. Jobson*, 13 Cox C. C. 625; *Leete v. Hart*, L. R. 3 C. P. 322; *Chamberlain v. King*, L. R. 6 C. P. 474; *Rochfort v. Rynd*, 8 Ir. R. C. L. 204; *O'Dea v. Hickman*, 18 L. R. Ir. 233; *Ibbottson v. Henry*, 8 O. R. 625; *Clark v. Woods*, 2 Ex. 395; *Cann v. Clipperton*, 10 A. & E. 582; *Heath v. Brewer*, 15 C. B. N. S. 803. The question of *bona fides* should have been submitted to the jury: *Allen v. McQuarrie*, 44 U. C. R. 62.

Aylesworth, for the respondent. The commitment in question was perfectly valid. The purpose of the commitment is to enforce payment of the penalty, and upon payment the commitment at once comes to an end, so that it is quite legal to make as much as possible under the distress, and then to imprison until the balance of the penalty is paid. A commitment of this kind is analogous to a *ca. sa.* in civil proceedings, that is, it is a commitment which the prisoner controls, and which can be put an end to at any time by him, and is not like a commitment for a definite term as a punishment. At all events the defendant acted in good faith and is entitled to notice of action: *Poulsum v. Thirst*, L. R. 2 C. P. 449; *Jolliffe v. Wallasey Local Board*, L. R. 9 C. P. 62; *Midland R. W. Co. v. Local Board*, 11 Q. B. D. 788. There was no evidence whatever to submit to the jury on the question of want of good faith, and the nonsuit was perfectly right.

Argument.

Argument.

McCarthy, Q. C. in reply. There is no analogy between this and a civil proceeding. This is not a proceeding to recover a debt but a punishment imposed because of a certain offence, and the statute must be strictly followed : *Morgan v Brown*, 4 A. & E. 515; *Regina v. Pratt*, L. R. 5 Q. B. 176.

March 4th, 1890. BURTON, J. A. :—

The point raised in this case is novel, and I should have been of the same opinion as the Judges in the Court below, previous to the argument and a full consideration of the authorities.

It is said that the commitment is nothing different in substance from an imprisonment under a *ca. sa.* in a civil proceeding, where the party can always relieve himself by payment of the debt.

I do not think that there is any analogy between the two proceedings. No greater or other punishment than that which formed the original adjudication can be inflicted; that punishment was a penalty of \$50 and costs, or in the alternative, if there was no distress from which the penalty and costs could be made, imprisonment for thirty days. If one half of the penalty had been made by distress, it must be clear that the party convicted ought not to suffer imprisonment for thirty days in addition; and there is no provision in the law, as it stands at present, to graduate or reduce the term of imprisonment in proportion to the amount paid upon the penalty.

The cases seem to show that unless there be sufficient distress to cover the penalty and costs, the return upon the warrant of distress should state that fact, and upon that a warrant of commitment may issue, but that if a portion of the penalty has been paid the amount should be returned before the alternative punishment is resorted to : *Oke's Magisterial Synopsis*, 10th ed., p. 170.

It is said that it differs from those cases in which corporal punishment is substituted for the penalty in the

event of its non-payment, inasmuch as the party may relieve himself at any time by payment of the amount ; but it strikes me as a distinction without a difference, inasmuch as the party convicted could also avoid the corporal punishment in like manner.

Judgment.

BURTON
J.A.

Unless *Trigerson v. Board of Police of Cobourg*, 6 O. S. 405, can be distinguished, it appears to be a clear authority that the warrant of commitment in this case could afford no justification. It was decided at a time when questions of this nature were much more frequent than at the present day, and by a court of very great experience in such matters, and it seems to be supported by the quotations from the text books admittedly of authority.

But the law thus laid down receives support from the statute regulating summary convictions and the forms in the schedule.

The power to commit is derived from the statute alone, and the directions under which it is authorized must be strictly followed.

It is only after the constable who has the execution of the warrant of distress has returned that he can find no goods whereon he can levy the sum or sums mentioned together with the costs of or occasioned by the levy of the same, that the justice is authorized to issue a warrant of commitment, and when we refer to the form of the return given in the schedule, we find that it is in these words :

“That by virtue of this warrant, I have made diligent search for the goods and chattels of the within mentioned A. B., and that I can find no sufficient goods or chattels of the said A. B. whereof to levy the sums within mentioned.” Neither in the enacting part of the statute nor in the forms is there any thing said as to a partial levy, showing an evident intention that the duty of the officer on such a warrant, if he finds the goods insufficient to levy the whole amount, is to return it unexecuted.

Upon such a return the statute authorizes the justice before whom the return is made to issue his warrant of commitment, which must, among other things, recite the return.

Judgment.

BURTON
J.A.

I asked, during the argument, whether any provision was made for issuing a further distress warrant in the event of part only having been made by distress, and I find there is no such provision, although it is provided by section 63 that upon proper proof of the existence of goods liable to distress in another territorial division, the warrant may be executed in that division, and that seems to contemplate that this may be done after part of the money has been levied; but with this exception, it would appear to be the officer's duty if the goods are insufficient to pay the whole, to return it unexecuted. See Paley, 13th ed. p. 336.

For these reasons I am opinion that there was no authority in the magistrate to issue the warrant of commitment, and that he became liable as a trespasser, and it appears to me that the first ground on which the learned Judge nonsuited—viz., that the conviction still remained unquashed, is not tenable.

The plaintiff does not complain of the conviction, but he says your mode of enforcing it was illegal, and for that I seek my remedy.

But then comes the further question of whether the defendant was entitled to notice of action; that again must, I take it, depend upon whether there was any evidence of want of *bona fides*. Very frequently no such question is submitted to the jury, because it is assumed all round that there was good faith, and neither party requires it to be submitted, but where the question is raised and insisted on at the trial, and there is any evidence warranting the submission of such a question to the jury, the Court cannot take upon itself to decide it.

The law, as I have always understood it, is very clearly and concisely stated in the judgment in *Taaffe v. Downes*, to be found in a note to *Calder v. Halket*, 3 Moo. P. C. at p. 36. That was an action against the Chief Justice of the King's Bench in Ireland for issuing a warrant under which the defendant was arrested.

The defendant pleaded that he was Chief Justice and issued the warrant in that character, and the plea was

demurred to, and one of the Judges thus refers to it. It in effect amounted to this, you the plaintiff being imprisoned under my warrant, have a right to try by your action in a Court of law, whether I am a Judge of the King's Bench, and whether I did more against you than issue a warrant according to the legal course upon an alleged criminal charge. If I have done more, you can, on my plea, prove it. If I made a warrant the fraudulent cover for oppression or corruption, or malice, you can aver that. If I have done anything against you not in the course of my office, you can say so; but however erroneous or illegal my act may have been, so long as it was done in the due course of my judicial duties, I am responsible to no one but the High Court of Parliament.

Judgment.

 BURTON
J.A.

The protection of a magistrate is not so absolute, but if he acts even without jurisdiction, or exceeds his jurisdiction, he is entitled to certain protection by statute, such as notice of action and a limitation of the time for bringing the action, if he *bonâ fide* acts, or believes that he is acting, in pursuance of the authority vested in him as a justice of the peace, and I apprehend in such a case it can make no difference that he is also influenced by the most express malice.

But where a justice has in any case acted colourably and vexatiously from any malicious or corrupt feeling without believing that he had authority to do what he did, then he has no right to the protection of the statute. This, however, is a matter which, if supported by evidence, would necessarily be for the jury, and the question is—was there any evidence proper to be submitted to a jury in support of such an issue?

This is in every case a preliminary question, which is one of law, and perhaps a more difficult—a more delicate—question, and one the importance of which frequently cannot be over-rated, can scarcely be presented to a judge for decision.

I think the rule is nowhere better stated than by Lord Blackburn, thus: "It was formerly considered necessary

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J.A.

in all cases to leave the question to the jury if there was any evidence—even a scintilla—in support of the case; but it is now settled that the question for the judge (subject of course to review) is as stated by Maule, J., in *Jewell v. Parr*, not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established.” This is the rule which I thought ought to have been applied in the cases of *Derinzy v. City of Ottawa*, 15 A. R. 712, in this Court, and in *Moxley v. The Canada Atlantic R.W. Co.*, in this Court, 14 A. R. 309, and in the Supreme Court, 15 S. C. R. 145, and those decisions are now binding upon me.

I am not quite able to understand one remark of the Chief Justice of the Supreme Court in the latter case, wherein he assumes that I have treated, what, if there was any evidence, would raise an inference of fact as one of law. I never for a moment doubted that if there was any evidence it was for the jury to draw the inference. I dealt merely with the preliminary question of law, which is admittedly for the judge, and held rightly or wrongly that there were no facts in evidence from which a jury could properly draw an inference; that any conclusion they might come to must necessarily be pure conjecture or guess work, inasmuch as the second engine threw fire also, and the result would be no more satisfactory than if the jury had resorted to a practice, it is said not wholly without precedent, of tossing a copper, a mode of disposing of litigants’ rights that would not meet with universal approval.

The origin of the fire not being shown, if only the one engine had passed, it might be quite competent for a jury to say, we think in the absence of any evidence of any other fire, that it came from that engine; but when a second engine which threw fire sufficient to cause the injury, passed much later and just before the fire broke out, I thought “there was no evidence that ought reasonably to satisfy a jury that the fact sought to be proved

was established ;" there was, I thought, evidence of a Judgment.
scintilla, but not a scintilla of evidence.

BURTON
J.A.

But although these decisions have somewhat shaken my confidence in what I believed to be the rule in such cases, I must, at the risk of again erring, hold that the evidence here failed to show that the defendant was acting colourably or vexatiously without believing that he had the right to do the act complained of, and in the absence of such evidence, it was, I think, for the Judge to decide whether the defendant was entitled to notice of action, and that he rightly decided that he was so entitled. The nonsuit therefore was right.

OSLER J. A. :—

The cause of action is the alleged illegal execution of a valid conviction by issuing a warrant of commitment after part payment of the sums adjudged to be paid. If the plaintiff is right, the case is in principle much the same as if the magistrate had attempted to enforce it after payment of the whole penalty and costs adjudged.

It cannot, therefore, be necessary to quash the conviction, for the unlawful act is really not done under it: Paley, 5th ed., 459.

Two points were argued: (1) Whether after payment or levy by distress of part of the sums adjudged to be paid, the magistrate could legally enforce payment of the residue by commitment; and (2) Assuming that he could not, and that in causing the plaintiff to be imprisoned, he was acting without, or in excess of jurisdiction, whether he was entitled to notice of action. This depends, in my opinion, simply upon whether he was, as the learned trial Judge held, acting in good faith in the execution of his office; but the plaintiff contends that he was absolutely entitled under any circumstances to have the question of *bona fides* left to the jury.

On the appeal a point was attempted to be made of the conviction not having been put in at the trial, but this is

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.A.

not open. Though not actually put in, its proof is to be assumed, for the plaintiff's counsel examined upon it without objection, nor was its absence made a ground of complaint in the Court below.

The question to be decided does not seem to have arisen since the case of *Trigerson v. Board of Police of Cobourg*, 6 O. S. 405, decided so long ago as E. T. 5 Vic., in days when Judges were certainly not less familiar than they are now with the old law on the subject of summary convictions. That was an action of trespass for false imprisonment. The defendants justified under a warrant of commitment. Robinson, C. J., who delivered the judgment of the Court, said that the plea was bad, among other reasons because it appeared that the plaintiff "had been imprisoned after part of the fine had been paid, *which is against law.*"

The case was one in which, like ours, the imprisonment was not alternative punishment, but merely for enforcing payment of the fine and costs. It is, therefore, directly in point, and there is a sort of presumption in its favour, despite the meagreness of the report; from its having remained so long unchallenged. Opportunities for doing so cannot have been wanting, especially if it had been thought that the Summary Convictions Act, to the provisions of which I shall briefly refer, had made any change in the practice instead of substantially adopting it, as I think it did.

The power to issue a distress warrant for the penalty and costs depends upon sections 60 and 62, R. S. C. ch. 178, which by force of section 107 of the Canada Temperance Act are incorporated in the latter Act.

The forms of the distress warrant recite the conviction, and that the defendant has not paid the sums adjudged to be paid or any part thereof. Section 63 provides that if sufficient distress cannot be found within the jurisdiction of the justice who granted the warrant, any justice of another territorial division may back the warrant and authorize the execution of it within his jurisdiction for so much of the penalty and costs, as has not been before levied or paid. Once begun, that mode of recovering the penalty may be followed out on the same warrant.

The power to commit in default of sufficient distress is clearly defined, and depending as it does upon special statutory provisions must be strictly pursued.

Judgment.

 OSLER
J.A.

Passing over sections 64 and 65 for the present, section 66, which may be called the general section, enacts that if the constable who had the execution of the distress warrant returns (N 4) that he could find *no goods* whereon he *could levy the sums mentioned*, (the form is, could find no *sufficient* goods or chattels of the said A. B., whereon to levy *the sums within mentioned*) the justice may issue his warrant (N 5) reciting shortly the conviction and the distress warrant and return, requiring the constable to arrest the defendant and deliver him to the gaoler, and the gaoler to receive and imprison him in the manner and for the time directed by the Act on which the conviction is founded, unless the sum or sums adjudged to be paid and costs, &c., are sooner paid.

By its very terms, therefore, the section contemplates the payment, by force of the imprisonment, of the sums adjudged by the conviction, and implies that no "sufficient distress" means no distress sufficient to pay those sums.

This section, indeed, is not that under which the warrant in question was issued, but it is that which prescribes the scope and terms of it. The justice, in such a case as this, proceeds under section 67, which provides that wherever the Act or law on which the conviction is founded, provides no remedy (which is the case here) in case it shall be returned to the distress warrant that no sufficient goods of the defendant could be found, the justice may by his warrant as aforesaid (that is as provided by, or by such a warrant as is mentioned in, section 66) commit him for any term not exceeding three months. So far as these two sections are concerned, the imprisonment is to be for the time mentioned in the conviction and commitment unless the sums adjudged to be paid, that is the sums mentioned in the commitment, which must be those specified in the conviction, are sooner paid. The contingency of part having been paid, or levied by distress, is

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not contemplated, nor the imposition of a period of imprisonment, graduated in proportion to the balance remaining unpaid. The commitment is to be issued upon the constable's return that he could find no sufficient goods whereon to levy the sum mentioned in his warrant, and the imprisonment to be imposed evidently has relation to the whole penalty, not to a part of it. It is true that as the justice is not bound at once to draw up the conviction, his discretion under section 67 as to the term of imprisonment need not necessarily be exercised until the return of the distress warrant, but it does not follow that payment or levy of part of the penalty forms an element in the exercise of such discretion, as the maximum term of the imprisonment which may be imposed in such an event is not reduced.

In prosecutions under the Indian Act, R. S. C. ch. 43, sec. 26 (2), (3), express power is given to commit after part of the penalty has been levied, and for a reduced term depending upon the amount which remains due. And under the Fisheries Act, there is express power to distrain for the fine and costs of the prosecution, and for the costs alone if the goods of the offender are only sufficient for that purpose, and he may be imprisoned for the fine: *Arnott v. Bradly*, 23 C. P. 1, with which compare the Acts under which *Regina v. Barton*, 13 Q. B. 389, was decided.

Section 64 of the Summary Convictions Act is also opposed to the existence of power to commit for part of the sums adjudged to be paid. It gives the magistrate power to commit in the first instance wherever it appears to him that the issuing of a warrant would be serious to the defendant and his family, or by the confession of the offender or otherwise, that he has no goods, that is to say, *no sufficient* goods whereon to levy the distress. See form O. 1. This section is taken from section 19 of the Imperial Act, 11 & 12 Vic. ch. 43, and proceeds upon the principle that the law never intended that a man should suffer both punishments for one conviction: Paley, 5th ed., 318.

In *Hill v. Bateman*, 2 Str. 710, it was held that an action of trespass lay against a magistrate for committing the plaintiff to prison without having first endeavoured to levy the penalty upon his goods, it being proved that they *were sufficient* to answer the penalty.

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 OSLER
J.A.

Inasmuch, therefore, as the sole power of the justice to commit for non-payment or in default of sufficient distress depends upon and is derived from the statute alone, and the statute does not expressly empower him to commit for non-payment of anything short of the whole of what was adjudged to be paid, I think it reasonably clear from the Act itself that a committal for part of the sum adjudged by the conviction to be paid, is not authorized by sections 66 or 67, and that such a committal is, as Sir John Robinson said in *Trigerson's Case*, against law. Imprisonment, even when it is resorted to merely as a means of enforcing payment, has the effect, when submitted to for the prescribed period, of discharging the offender altogether, unless otherwise expressly declared: *Bowdler's Case*, 12 Q. B. 612; and is thus a satisfaction, and in some sense a punishment, for the offence: *Robson v. Spearman*, 3 B. & Ald. 493. He has the option of paying in purse or in person, and if he suffers imprisonment for non-payment of part of the fine, the residue having been paid or levied by distress, he really pays or is punished twice for the same offence.

The general dictum of the text books, as to the practice, accords with the construction I place upon the statute. In such a standard practical work as Oke's *Magisterial Synopsis*, 6th ed., p. 170; 7th ed., p. 172, we find it laid down that no part less than the whole amount adjudged to be paid, should be received, nor by instalments except where such power is given by statute, for if it becomes necessary to issue the commitment, what has been received must be refunded. So also in the 4th, and subsequent editions to the 20th, of Stone's *Justices' Manual*, it is said that time cannot be granted on payment of part, "as it is conceived that after part payment, the right of commit-

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ment would be gone, the justice having no power to apportion the period of imprisonment. The law does not intend a man to suffer two modes of punishment, *i. e.*, in purse and person for the same offence; and on this principle where the goods of an offender are not sufficient to satisfy a distress, they ought not to be taken, but the ulterior punishment should be resorted to."

In the later editions this is omitted in consequence of the Summary Jurisdiction Act of 1879 having now made express provision on the subject and enabled the magistrate to commit for terms of imprisonment graduated in certain proportions to the amount remaining unpaid. See Wigram's Justices' Note Book, pp. 17, 20.

See also Greenwood and Martin's Magisterial and Police Guide, p. 314, where the former practice is stated in the same way.

Paley merely says that if imprisonment be imposed by statute in default of sufficient distress, and the defendant has not sufficient to satisfy the amount, the goods ought not to be taken, but the corporal punishment should be at once resorted to—5th ed., pp. 306, 318, citing *Rex v. Wyatt*, 2 Ld. Raym., 1189, which is no doubt a case in which imprisonment was imposed as an alternative punishment in default of sufficient distress; but the principle equally applies where it is merely a means of enforcing payment, for, if it may be resorted to where half the fine has been paid or levied, the offender may, if he cannot pay the residue, suffer an imprisonment which was imposed for non-payment of the whole, and is, at all events, deprived of the right of satisfying the whole penalty and costs by submitting to imprisonment instead of paying the fine, &c.

So far as any inference can be drawn from the absence of any appropriate form in the statutes or text books, it is against the existence of the right to commit for non-payment of part of the money adjudged to be paid, and I find no case which supports it except that of *Rex v. Speed*, 12 Mod. 328, 331; *Ld. Raym.* 583; *Carthew* 502; (*M.*

T. 11 Wm. III.,) which is not, however, cited in the text books on this point. There is a statement in the report in 12 Modern (only), which seems quite opposed to what is said to have been held in the later case of *Rex v. Wyatt*, 2 Ld. Raym. 1189, 11 Mod. 54, (M. T. 4 Ann.) In both cases the conviction was upon the same Act, the Deerstealing Act, 3 W. & M. ch. 10.

Judgment

OSLER
J. A.

In my opinion the defendant had no authority to issue the warrant of commitment against the plaintiff, and therefore, though he erred through ignorance of the law, he is not protected from liability. "The facts of the case which were before him and could not be unknown to him, shewed that he had not jurisdiction," (that is, jurisdiction over the person of the plaintiff,) "and his mistaking the law as applied to those facts, cannot give him even a *prima facie* jurisdiction or even the semblance of any." *Houlden v. Smith*, 14 Q. B. 841; *Pease v. Chaytor*, 3 B. & S. 620, 644; *Calder v. Halket*, 3 Moo. P. C. 28; *Connors v. Darling*, 23 U. C. R. 541; *Regina v. Bolton*, 1 Q. B. 66; *Usill v. Hales*, 3 C. P. D. at pp. 323, 324.

But though the defendant was thus mistaken in his law, and has rendered himself liable to an action of trespass, he may, nevertheless, be entitled to notice of action under the statute, and the nonsuit may be upheld on one of the grounds taken by the learned Chief Justice at the trial, that no notice of action had been given.

The question in actions of this kind against a magistrate is, whether the defendant *honestly believed that he was acting in the execution of his duty or office as such*. "It is quite clear," says Sir John Robinson in *Bross v. Huber*, 18 U. C. R. at p. 287, "that when a justice has made in any case a mere pretence of his official authority, and has acted colourably and vexatiously from any malicious or corrupt feeling *without believing he had authority to do what he did*, then he has no right to the protection of the statute." And as illustrating the same principle, I refer to *Hermann v. Seneschal*, 13 C. B. N. S. 392; *Roberts v. Orchard*, 2 H. & C. 769; *Chamberlain v. King*, L. R. 6 C. P.

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J.A.

474, 478; *Selmes v. Judge*, L. R. 6 Q. B. 724, 728; *Venning v. Steadman*, 9 S. C. R. at p. 238, though these were not actions against magistrates, but against persons acting in supposed pursuance of a statute.

I quite agree that if there was evidence of want of *bona fides*, it was for the jury, if the plaintiff desired it to be left to them: *Neill v. McMillan*, 25 U. C. R. 485; *Allen v. McQuarrie*, 44 U. C. R. 62.

As Mr. Justice Gwynne observes in *Venning v. Steadman*, 9 S. C. R. at p. 238, in reference to this very question: "If there had been any doubt upon that point, the question of fact, (*i. e.*, of *bona fides*) should have been left to the jury."

On the plaintiff's own shewing, the act he complains of was done by the defendant in his character of justice, and he therefore assumed the onus of proving the absence of *bona fides*, for *mala fides* is not to be presumed, and if on the plaintiff's own shewing the defendant was acting in the capacity of justice of the peace in good faith, believing that he had the right as such, with nothing to raise a contrary presumption, there is nothing for the jury.

Upon a careful examination of the evidence, I feel quite clear that there was nothing upon which the jury could properly have found that the defendant was not honestly acting in the execution of his office. He was admittedly a magistrate; there was a valid conviction of the plaintiff, the fine imposed thereby remained unpaid, and the commitment was issued for the purpose of enforcing payment. These are the facts proved in the plaintiff's own case, and he proves moreover by the defendant's examination, which he put in as part of his case, that the defendant did it because he was compelled to do it, and in the discharge of his duty. These facts are not controverted, and there is no evidence that the defendant knew or had any reason to believe that it was or might be illegal to issue the commitment after payment of the costs. It would, indeed, be surprising if he had, for the learned Chief Justice at the trial seems to have thought he was right in doing so, and

the defendant must be in at least as good a position as he would have been if he had in fact entertained a doubt as to his authority, and had taken and had acted upon legal advice.

Judgment.

OSLER
J.A.

The only suggestion of *mala fides* which has any appearance of plausibility is, that the commitment was enforced to gratify some angry feelings on the defendant's part, and in breach of an alleged arrangement by which the plaintiff was to be absolved from payment of the fine if he satisfied the costs. But in the first place the defendant, in his examination put in by the plaintiff, denies it, and the plaintiff himself does not swear that there was any such arrangement. On the contrary he admits that when called upon to pay the fine, he only remonstrated with the defendant for pressing for it so soon, and made no complaint of any breach of faith. The defendant's son, through whom the alleged arrangement was suggested to have been made, was not called. A long conversation between him and the plaintiff was admitted, subject to counsel's undertaking to connect it with the defendant, which he failed to do. It is, therefore, not in evidence for any purpose; and the sole evidence of any interview between defendant and his son relative to the fine, is found in the defendant's own account of it in which any arrangement is wholly denied. Secondly, assuming that the existence of a malicious or angry motive in the defendant might, under some circumstances, be some evidence from which a jury might infer that he was acting colourably and without any real belief of his authority, yet in the present case it constitutes at most that mere scintilla of evidence which in accordance with the well established rule, ought not, to be left to them, because, in the face of all the other facts proved in the case, no jury could reasonably infer therefrom that the defendant was not intending to exercise an authority which he honestly believed that he possessed. The defendant may have been, as we hold, mistaken in his law; but as the plaintiff himself has proved that he acted, notwithstanding, in good faith, he

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J.A.

was entitled to notice of action, and as it was not given, the nonsuit must be upheld and the appeal dismissed.

HAGARTY, C. J. O., concurred.

MACLENNAN, J. A.:—

In this case I agree with the other members of the Court that it is illegal to issue a warrant of committal in such a case as the present after payment of the costs or levy of part without first returning to the defendant what has been paid.

I am also of opinion that the action fails for want of notice of action as provided by the 14th section of the Act, R. S. O. (1887) ch. 73, for the protection of Justices. The issue of the warrant of commitment was an act done by the defendant in the execution of his office as Police Magistrate for the County of Norfolk.

It was claimed by the plaintiff's counsel at the conclusion of the case that he had a right to the opinion of the jury whether the defendant *bonâ fide* believed he was acting in the execution of his office and had the right to issue the warrant and the learned Chief Justice decided that there was no evidence which could properly be submitted to them.

It is a question which seems not to be settled whether in such cases the question of *bona fides* is for the judge or for the jury. In *Allen v. McQuarrie*, 44 U. C. R. 62, it was held to be a question for the jury, following *Neill v. McMillan*, 25 U. C. R. 485. In *Bross v. Huber* 18 U. C. R. 282, the decision was the other way, relying on the opinion of Parke, B., in *Kirby v. Simpson*, 10 Exch. 358. There seem to be no later decisions and in the last edition of Taylor on Evidence, p. 54, s. 38, the law is stated thus: "Thus in actions against magistrates for acts done in the execution of their office the judge must decide whether notice of action is necessary and the question of *bona fides* must consequently be determined by him and not by the jury"

The authorities cited by Mr. Taylor for this are *Kirby* Judgment. v. *Simpson*, 10 Exch. 358, and *Arnold* v. *Hamel*, 9 Exch. 404, also a decision of Parke, B. MACLENNAN
J.A.

The law is stated in almost the same terms, citing *Kirby* v. *Simpson*, in the last (6th) edition of Addison on Torts, p. 778: "The question as to whether the magistrate was acting in the execution of his office is a question at the trial for the judge and not for determination by a jury."

The subject is referred to in Roscoe's N. P. (15th ed.) p. 1096, as follows:—"It has already been shown that whether the action be brought under section 1 or section 2 of 11 & 12 Vic. ch. 44, the defendant is entitled to notice; but in the case of *Kirby* v. *Simpson*, 10 Exch. 358, Parke, B. expressed his opinion that it was for the judge to determine (under section 2) whether the defendant was acting *bonâ fide* in the execution of his office"; but at p. 1100 of the same work it is said that the question has been commonly treated as one for the jury, and a number of cases are cited in which that was done.

I think however it is not necessary for us to determine this question in the present appeal for I am of opinion that if it was a question for the jury the learned Judge was right, and there was no evidence whatever on which they could properly find that the defendant was not *bonâ fide* acting in the execution of his office, and in the *bonâ fide* belief that he had the right and power to do what he did.

I think the evidence of what was said to the plaintiff by the defendant's son must be disregarded altogether as hearsay, having been objected to and there being no proof that he had been authorized or requested by the defendant to speak to the plaintiff. When the remainder of the testimony is examined there is some evidence of annoyance, irritation, and anger, on the part of the defendant, which might be some evidence of malice, but the most malicious motives are no evidence of want of *bona fides*, and of the latter I am unable to discover any evidence whatsoever.

I think the appeal should be dismissed.

Appeal dismissed with costs.

McDONALD v. McDONALD.

Trusts and trustees—Executors—Acceptance of office—Purchase by trustee of trust property—Laches—Statute of Limitations.

The plaintiff and defendant were brothers and their father, who died in the year 1846, appointed the plaintiff and two other sons of the testator his executors, and among other bequests devised the land in question to the defendant. The testator had endorsed a note for the accommodation of the plaintiff, and after the testator's death the holders of this note sued the plaintiff and the two brothers as executors and recovered judgment against them. The land in question was sold under that judgment at sheriff's sale and was bought in by the plaintiff. The will had been registered but had not been proved. Subsequently the plaintiff mortgaged the land in question and sold it subject to the mortgage. The mortgagees afterwards sold and the plaintiff again bought in the land.

Held, that the plaintiff and his brothers having defended the action on the note as executors, and judgment having been recovered against them as such must be held to have accepted the office; that want of probate was therefore immaterial and that the sheriff's sale was valid.

Held, also, that it being the plaintiff's duty to pay the note, he had not acquired title to the land for his own benefit at the sheriff's sale, but became a trustee for the devisee, the defendant, and that this trust revived when the plaintiff bought in the land for the second time.

Held, further, that assuming that the plaintiff was not a trustee for the defendant and had no paper title there was not, upon the evidence, any possession of the land in question by the plaintiff sufficient to confer a title under the Statute of Limitations.

Held, lastly, that the situation of the parties not having changed the defendant was not bound by laches.

Judgment of the Chancery Division affirmed.

Statement.

This was an appeal by the plaintiff from a judgment of the Chancery Division which reversed a judgment of FALCONBRIDGE, J., in his favour.

The action was brought for the recovery of 50 acres of land composed of the west half of the east half of lot number eighteen in the seventh Concession of the Township of Cornwall.

The plaintiff and defendant were brothers, the sons of one Lachlin McDonald, in his life time a farmer who owned 300 acres of land; 200 acres of which, composed of the west half of lot 17, and the east half of lot 18, in the 6th Concession of Cornwall, were his homestead, on which he resided with his family; and the other 100 acres of which lay in the 7th Concession, immediately in rear of the west half of the homestead. Lachlin McDonald's dwelling house, and his

cleared land and improvements, were all upon the first 200 ^{Statement.} acres, and the rear 100 acres were in his life time and ever since, until a recent period, uncleared, unfenced, unimproved, and unoccupied, with but a very slight exception.

On the 22nd of December, 1845, Lachlin McDonald endorsed a note for £200, made by his son Duncan, the plaintiff, for the accommodation of the latter, payable four months after date, and this note was held by the Commercial Bank unpaid at the time of his death, which occurred in or soon after April, 1846, about the time the note became due.

The plaintiff had been engaged in some kind of business in which he failed, and he was unable to pay the note at maturity.

On the 6th of April, 1846, Lachlin McDonald made his will, by which he gave the westerly 100 acres of his homestead to his widow and his daughter Mary for life, with remainder in fee to his son William. He also gave all his stock, utensils, and furniture to his widow and Mary, and whatever might be left of these at their death to William. He gave the east half of the homestead to his son John in fee, with certain qualifications not material to this case.

Then he divided the rear 100 acres between his sons William and Alexander, the defendant, giving William the east half and the defendant the west half, the 50 acres in question. He then appointed three of his sons executors, the plaintiff, Duncan McDonald, being one, and requested that "they will be good enough to cause this my last will and testament to be duly executed."

This will was never proved, but it was registered in the registry office for the County by a memorial signed by one of the executors, not the plaintiff, on the 3rd of October, 1846, and the plaintiff said in his statement of claim that he and the other executors took upon themselves the administration of the testator's estate, and his evidence was to the same effect.

About July, 1847, the Commercial Bank commenced an action on the £200 note against the three executors of the

Statement. testator. The executors defended jointly, denying endorsement, presentment, and notice of dishonour, but not denying their executorship, and the action proceeded to trial, judgment being entered on the 6th of November, 1847, against the defendants as executors in the usual form, for £236 8s. 1d. for debt and costs.

It appeared that some £50 of this judgment were recovered by execution against goods, and ultimately the sheriff sold the whole 300 acres of the testator's lands for the sum of £201 10s.

The plaintiff was the purchaser from the sheriff, and he obtained from him a conveyance, dated the 4th of August, 1849, of the 300 acres, and this conveyance was the foundation of his paper title in the present action.

Immediately after obtaining the sheriff's deed the plaintiff made a mortgage of the land to the Commercial Bank for £259 12s. 5d., and he said that this was done in pursuance of an arrangement made with the Bank before the sale, that he was to buy the property at the sale, and the Bank would take a mortgage from him for the purchase money, and would give him time for payment. He said he bought the property for himself, adding, "I bought it to protect the property." He admitted that at the time of the sale it was worth £1000, and might be worth \$6,000 or more in 1865, and there was other evidence to the same effect.

The mother and sister of the plaintiff remained in undisturbed possession of the homestead until their deaths, that of the sister taking place in 1872, and that of the mother in 1873, but one Alexander Fraser, who lived in the neighbourhood, was looking after the land for the plaintiff, and in March, 1875, was given a power of attorney for that purpose.

On the 15th of November, 1853, the plaintiff executed a conveyance of the 300 acres to his brother William for the expressed consideration of \$2,000, out of which William was to pay the mortgage to the bank, and it was alleged that this was done. William afterwards got into difficulties and the land was again sold by the sheriff under execution against

William's lands and was bought by the plaintiff for \$599. *Statement.* The plaintiff then obtained a second conveyance of the lands from the sheriff, dated the 15th of April, 1865, and this conveyance constituted his present paper title.

At or about the time of the death of the testator there appeared to have been a small shanty upon the west half of the north 100 acres with a small clearing, of an acre or a little more of land, about it. This shanty was soon afterwards pulled down, and from that time until three or four years before action there was no actual occupation of the 50 acres in question by any person. The land was covered by the original forest with the exception of the small piece already mentioned, and that small piece was an unenclosed open common with a new growth of bush.

In 1876 the front 200 acres were leased to one Alex. McGuire who occupied under the plaintiff until the time of the trial, in common, however, with the widow until the time of her death in 1883. McGuire said he had to pay taxes on the whole 300 acres; that in about three different years persons by arrangement with him tapped the maple trees on the south 100 acres and made syrup, sharing the produce with him; that three years before action he rented it to one Keefe, who put some fences upon it and cropped it, and that he sometimes took fallen trees for his firewood from the north 100 acres.

McGuire also said that after the first two years of his tenancy, which would be about 1878, until he leased it to Keefe, the whole place, that is, the north 100 acres, was a common. Keefe said that he had known the property (the north 100 acres) since 1843, and that before he fenced it three or four years ago, it had been a common and unenclosed for more than twenty years.

There was other evidence to the same effect.

About December, 1888, the defendant took possession of the land and built a small shanty thereon, and this action was brought immediately by the plaintiff to recover possession. In his statement of claim the plaintiff set up title

Statement. under the sheriff's sales and conveyances which have been referred to, and by length of possession, claiming that he and his brother William had been in possession ever since 1849.

The defendant set up that the first sheriff's sale being for the plaintiff's own debt the purchase by him was a fraud upon the devisees under his father's will, and that he thereby became, and still was, a trustee for the devisees. He denied the possession of the plaintiff, and alleged that the land was vacant and unoccupied, and that the legal possession was always in himself, and by way of counter claim asked for damages for timber lately cut and removed by the plaintiff.

The action was heard at Cornwall, at the Spring Assizes of 1889, before FALCONBRIDGE, J., and the learned Judge gave judgment for the plaintiff with costs, but this judgment was reversed on appeal by the Chancery Divisional Court.

An appeal by the plaintiff from the latter judgment came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A.), on the 5th of February, 1890.

H. Symons, for the appellant.

Moss, Q.C., for the respondent.

March 4th, 1890. HAGARTY, C. J. O.:—

The Divisional Court dismissed the plaintiff's case at the hearing. We have not the advantage of knowing their views on the point raised in the appeal from their decision. The Statute of Limitations, which was mainly relied on before us is briefly referred to by the trial Judge thus: "The plaintiff, can also probably maintain his claim to the land by length of possession since the death of his mother in 1873." But there is no specific finding of possession. The learned Judge apparently considered that the defendant's laches and acquiescence during the last forty years barred his right.

It was but faintly urged before us that apart from the Statute of Limitations and the alleged laches and acquiescence the plaintiff's title could be supported on any recognized principles of equity.

I see no reason for holding that the defendant is barred by laches. It is well put in the Privy Council, *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. at p. 239: "The doctrine of laches in Courts of Equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable." It is not shewn here against the defendant's equitable rights that the plaintiff's position has been substantially altered. The land remains in his hands, as it has been from his first purchasing at sheriff's sale, almost in a state of nature.

As to the Statute of Limitations I think the plaintiff fails to make it applicable. There has been no such possession shewn as to warrant its application.

Till the last four or five years there can hardly be said to be any real clearance or cultivation of the lot.

The plaintiff through his agent Fraser appears to have leased this 100 acres and the 200 acres in front to tenants, but no occupation has been shewn of the land in dispute. Sugar has been occasionally made on it and timber cut, but nothing sufficient in my judgment to establish a statutable possession.

It would be a matter of much regret if the course of conduct pursued by the plaintiff since his father's death in

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respect of the estate of which he was executor cannot be reached by the arm of the law, at least to the extent of supporting the defendant's claim to the portion of the estate devised to him.

MACLENNAN, J. A.:—

[The learned Judge stated the facts as above set out and continued:]

There are two questions to be decided in the appeal: first, whether, supposing the defendant's title not to have been lost by the sheriff's sale in 1849, he has lost it by the Statute of Limitations; and secondly, if he has not lost it by the Statute of Limitations, whether the plaintiff can succeed upon his paper title.

On the first question I am clearly of opinion that the defendant has not been barred by the Statute.

I am of opinion that the proof of an actual and continuous occupation by the plaintiff or anyone on his behalf at any time since 1849, for a period sufficiently long to come within the Statute, altogether fails. There is some evidence of a man named Butler having once occupied the small shanty which stood on the land, sometime about 1873, or 1874, as nearly as I can make out, but how long he had been there, or how he came to be there, does not appear. He appears to have been removed by Fraser, and the shanty was then demolished. From that time, with the exception of about two years after April, 1876, when McGuire became tenant of the front 200 acres, until three or four years before the trial, there was no pretence of actual occupation or possession by any one, and nothing but a succession of trespasses with long intervals between.

It is now decided by the highest authority that the possession which is sufficient to bar the owner must continue for the requisite period without interruption: *Agency Co. v. Short*, 13 App. Cas. at p. 798. The law is there laid down as follows:

"If a person enters upon the land of another and holds

possession for a time, and then without having acquired title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. There is no one against whom he can bring an action. He cannot make an entry on himself. There is no positive enactment, nor is there any principle of law, which requires him to do any act, to issue any notice, or to perform any ceremony, in order to rehabilitate himself. No new departure is necessary. The possession of the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose. It does not leave behind it any cloud on the title of the rightful owner, or any secret process at work for the possible benefit in time to come of some casual interloper or lucky vagrant;" and the language of Parke, B. in *Smith v. Lloyd*, 9 Exch. 562, is quoted with approval: "We are clearly of opinion that the Statute applies, not to want of actual possession by the plaintiff, but to cases where he has been out of, and another in, possession for the prescribed time. There must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected, to bring the case within the Statute."

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I think the case of *Harris v. Mudie* in this Court, 7 A. R. 414, in which the authorities were elaborately reviewed by my learned brother Burton, shews that such acts as were done here, when done by a person having no colour of title, do not constitute the kind of possession which is necessary to put the true owner to his action to recover possession.

I think it is clear, then, that if the plaintiff had no paper title he could not succeed in his action, and it remains to consider whether his paper title entitles him to judgment.

Nothing can be clearer than that when the plaintiff bought the land at the sheriff's sale in 1849, and obtained a conveyance, he became a trustee for the devisees under his father's will. The debt was his own debt. It was his

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duty to pay it, and to relieve his father's estate from the execution. His father having been an accommodation endorser, and a mere surety, the plaintiff's co-executors could have brought a suit and have obtained a decree against him to compel him to pay it, and to save the land from being sold. Every bid he made at the auction was an offer to pay his own debt, and if he had paid cash at the sale, it would have been improper for him to take a conveyance from the sheriff.

He says that he had no money with which to buy the land, and he could not have bought but for his previous arrangement with the Bank to give him time, and in that case the land would have been bought by a stranger. If, as he says, he bought to protect the property, that is, to save it for the devisees, in hopes that in time he could pay the debt, and rescue it for the rightful owners, no fault can be found with him for buying at the sheriff's sale. But his subsequent conduct has not been in conformity with those motives, and however it was at the first, it is evident that some time afterwards he made up his mind to defraud his brother, the present defendant, out of the land in question, and to make use of the sheriff's sale for that purpose.

No doubt the sheriff's sale vested the legal title to the land in the plaintiff, for I think the want of probate was immaterial: *Mandeville v. Nichol*, 16 U. C. R. 609. He and the others were sued as executors, and defended as such, and did not plead denying the office, and that was sufficient to constitute an acceptance of the office: 1 Williams on Executors, 6th ed., 255, 267. But although he obtained the legal title, he was a bare trustee of the land in question for the defendant. He had not a particle of beneficial interest in it, and it was his duty to pay off the mortgage which he gave to the Bank, and to procure from the Bank a re-conveyance to the defendant. In my judgment, after he had mortgaged to the Bank, he had, in truth, no title whatever, either legal or equitable, in the land. The legal title was in the Bank, and the equitable title was in the defendant.

That state of things continued until 1853, when he executed the conveyance to his brother William, and we know that at this time the mortgage to the Bank was still unpaid, and it seems to follow that nothing passed to William by that conveyance.

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It is expressed to be in consideration of \$2,000, but the plaintiff says he does not sufficiently remember how much he got from his brother. He says there were conditions. He was to see to the family and assist the family; he was to settle the mortgage, and did so. They had had some transactions between them, and William took the farm for what the plaintiff owed him. There is no evidence of the payment of the mortgage except this statement of the plaintiff, and it does not appear whether there ever was any discharge or reconveyance of that mortgage procured. For anything that appears in this action the legal title to the land may still be in the mortgagee, and if so, neither the plaintiff nor William ever had any right, title or interest, legal or equitable, in the land in question since the day the mortgage was made by the plaintiff to the Commercial Bank, for if William got no title or interest from the plaintiff, and if he never got the legal estate from the Bank, he had nothing which the sheriff could sell under the execution against his land. It is true that questions might be raised as to the effect of the registry laws if they had been set up and proved. But the plaintiff does not in any way rely on the effect of registration, nor does it even appear when the first sheriff's deed or the conveyance to William was registered.

In a case like the present, where the justice of the case appears to be with the defendant, and when the plaintiff is relying on the Statute of Limitations to enable him to benefit by his own fraud, he cannot complain if his title and his proof are very closely examined, and if he is held to strict proof of his right to recover the land.

But if we suppose that William obtained a reconveyance of the legal estate from the Bank, then the second sheriff's sale was effectual to pass the legal title to the plaintiff a

Judgment. second time in 1865, and the question arises as to the effect of that.

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It is clear upon the authorities that inasmuch as the plaintiff was a bare trustee of the land when he conveyed to William, and inasmuch as the mortgage was one which it was the plaintiff's duty to pay off, it was not only a fraud on his part to sell to William, but it was his duty, if he could, to undo the sale, or to get the land back for his *cestui que trust* by every means in his power. Therefore, when he did get it back, even though he paid value for it, the trust revived, and he was then as much trustee for the defendant as he was before: Lewin, 8th ed., p. 860. In *Barrow's Case*, 14 Ch. D. at p. 445, Jessel, M.R., said "The only exception, and the well-known exception, to the rule which protects a purchaser with notice taking from a purchaser without notice, is that which prevents a trustee buying back trust property which he has sold, or a fraudulent man who has acquired property by fraud, saying he sold it to a *bonâ fide* purchaser without notice and has got it back again. Those are cases to shew that a person shall not take advantage of his own wrong."

I think, therefore, that, taking the most favourable view of the plaintiff's case, he has been ever since the year 1865 a bare trustee for the defendant of the legal title of the land in question, not holding it in any way for himself, but holding it for the defendant. To pretend he was holding it for his own benefit is to admit that he is guilty of fraud, for he never had, and never could for one moment during all the years which have elapsed have had, the slightest reason to think that he could have any honest claim to be the owner of the land; and if at any time during that period he had entered upon the land, or had attempted in any way to interfere with the defendant in his use of it, a Court of Equity would have held him to be a trespasser, and would have restrained him by injunction, and would have decreed him to reconvey to the defendant. And for the same reason I am of opinion he cannot succeed in his present action.

The ground of laches was also a good deal pressed on us, but as there has been no change in the situation of the parties, I think that ground also fails: *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P.C. 221.

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J. A.

One cannot help regretting that, in the face of the solemn request contained in his father's last will and testament, that the plaintiff and the other executors "would be good enough to cause his last will and testament to be executed," the plaintiff, now a wealthy man, should have endeavoured by the means detailed in the evidence to deprive his brother, the defendant, of the small piece of land which their father had given him in that will.

The appeal should be dismissed.

BURTON, and OSLER, JJ.A., concurred.

Appeal dismissed with costs

THORNLEY V. REILLY.

*Intoxicating Liquors—Liquor License Act—Sale of Liquor after notice—
Notice how given—R. S. O. (1887,) ch. 194, sec. 125.*

Statement. This was an appeal by the defendant from the judgment of the County Court of York, reported 26 C. L. J. 26, and came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A.,) on the 13th of February, 1890.

Murdoch, for the appellant

Le Vesconte, for the respondent.

The plaintiff, a married woman, brought the action under R. S. O., (1887) ch. 194, sec. 125, to recover from the defendant, an hotel-keeper, damages because of the sale by him to her husband of intoxicating liquor after notice not to sell. The notice was signed by the plaintiff and served by her agent.

The action was tried before MACDOUGALL, Co. J., and a jury, and the damages were assessed at \$100. The defendant contended that notice signed and served as aforesaid was insufficient and that notice by the Inspector was necessary. The learned Judge decided against this contention and judgment was entered for the plaintiff.

Judgment. March 4th, 1890. This Court were divided in opinion and the appeal was dismissed with costs.

Per HAGARTY, C. J. O., and BURTON, J. A. The right of action for damages depends on the notice being given by the person filling the public position of Inspector, though the liability as far as the penalties are concerned will be incurred upon notice being given by the private individual. This is the reasonable construction of the words "person requiring the notice to be given" in themselves and would appear to be the intention of the Legislature, these narrower words having been substituted for the wider ones of the former section.

Per OSLER, and MACLENNAN, JJ. A. The whole scope ^{Judgment.} and effect of the section must be looked at and a liberal construction given to it. The notice must in all cases be signed by the private individual and whether served by the Inspector or not the private individual gives the notice, so that the words may fairly be construed to mean "person requiring to give the notice" and there is a right of action whether the notice is served in one way or the other.

TEMPERANCE COLONIZATION SOCIETY v. FAIRFIELD.

Contract—Fraud—Rescission—Repayment of consideration—Statute of Frauds—Uncertainty.

This was an appeal by the plaintiffs from the judgment ^{Statement.} of the Common Pleas Division, reported 16 O. R. 544, and came on to be heard before this Court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 13th and 14th of November, 1889.

McCarthy, Q. C., and *A. H. Marsh*, for the appellants.
Maclaren, and *McClive*, for the respondent.

March 4th, 1890. The appeal was dismissed with costs. ^{Judgment.}

Per HAGARTY, C. J. O. The agreement was void for uncertainty, the land in question not being in any way defined or ascertained or capable of being defined or ascertained, and at any rate misrepresentations justifying rescission were proved.

Per BURTON, OSLER, and MACLENNAN, JJ. A. The plaintiffs were unable to give to the defendant the right of selection they had agreed to give him so that the action necessarily failed, and the defendant was entitled to judgment on his counter-claim there being a failure of consideration.

Per BURTON, J. A., also. The agreement was in itself sufficiently certain, and was not void for misrepresentation.

Per MACLENNAN, J. A., also. No misrepresentations justifying a rescission of the contract were proved, but the agreement was void for vagueness and uncertainty.

DANIELS V. NOXON.

Mortgage—Shares—Sale—Wilful neglect or default.

The defendant, who was mortgagee of certain shares in a company, sold them by auction. The plaintiff, who was entitled to the shares subject to the defendant's claim, knew of and ratified the sale. The purchaser refused upon various grounds to carry out the sale, and no attempt was made by the defendant to compel completion of the contract. Subsequently the shares fell very much in value :—

Held, [BURTON, J.A., dissenting], that there was no duty cast upon the defendant to take proceedings against the purchaser to compel completion, and that he was not liable to account for the shares at the price that would have been realized had the sale been completed. The plaintiff could have paid the defendant's claim and then have herself taken proceedings against the purchaser, and not having done so, was not entitled to complain.

Judgment of ROSE, J., affirmed.

Statement.

THIS was an appeal by the plaintiff from the judgment of ROSE, J.

The material facts of the case were as follows :

One Wells was a member of a firm of solicitors, Brown & Wells, and was administrator with the will annexed of the estate of the plaintiff's deceased husband. The firm of Brown & Wells had moneys of the estate in their hands, and on the 5th of September, 1885, owed the plaintiff a large sum. At that date one hundred shares of the par value of \$10,000, of the Noxon Manufacturing Co., which belonged to Wells, were standing in the name of the manager of the Imperial Bank, as security for \$3,500 (a debt of Brown & Wells to the bank) and some other matters. Wells had agreed to give this stock, subject to the debt due to the bank, to the plaintiff as security for what was due to her, and he asked the defendant to settle with the bank and to take a transfer of the shares for his security, and to hold them subject to redemption by the plaintiff until the expiration of six months.

The defendant agreed to this, and was to have a bonus of \$300 for doing it. He paid the bank's claim, and obtained a transfer of the shares into his own name, and an instrument, dated the 5th of September, 1885, was prepared, and signed by the parties, which was, in effect, a

mortgage of the shares by the plaintiff to the defendant to secure payment of the moneys mentioned therein, which the plaintiff thereby made her own debt, and agreed to pay. Statement.

The six months within which the plaintiff was to have paid the money expired on the 5th of March, 1886, but it was not paid, the plaintiff being unable to do so, and on the 11th of March the defendant notified her that unless the debt were paid within thirty days he would sell the shares.

Negotiations took place between the defendant and the plaintiff's solicitor, the defendant endeavouring by representing that the shares were not worth more than the amount of his claim to obtain a release of the plaintiff's interest. This the plaintiff's solicitor refused to give, and no arrangement being arrived at the shares were sold on the 10th of May, 1886, at seventy-one cents on the dollar, a price sufficient to leave a large surplus for the plaintiff.

Wells was present at the sale under instructions from the plaintiff's solicitor looking after the interests of the plaintiff, and made a number of bids on behalf of the plaintiff, though without disclosing the fact that he was acting for her.

The sale was approved of and ratified by the plaintiff, and no fault was found with it, either as regards the purchaser, the price, the terms of sale, or otherwise.

About two months after this sale the plaintiff brought this action asking for an account.

The statement of claim was filed on the 16th of September, 1886, and asked for an account of the defendant's dealings under the instrument of the 5th of September, 1885, and apparently proceeded upon the theory that the defendant had received the purchase money.

The defence was filed on the 15th of October, and denied the receipt of the purchase money; alleged that the purchaser refused to carry out the sale on the ground of the employment of puffers; admitted the receipt of dividends on the stock, and offered to account for them; offered to transfer the shares and contract to the plaintiff on receiving

Statement. payment of the debt; and claimed judgment against the plaintiff for the mortgage debt.

On the 16th of October, the plaintiff joined issue upon the defence, and without any further alteration of the pleadings the case went to trial before BOYD, C., at Woodstock on the 3rd of November, 1886.

At the trial no evidence was taken, but by consent an order was made to the following effect:—(a) The action and all questions arising therein, were referred to Mr. Beard, the Master of the Court, for enquiry and report, with all the powers of amendment of a judge at the trial; (b) The Master was to report specially whether there had been a valid sale of the shares binding on the defendant and the amount thereof; (c) If the Master found there was a valid sale, he was to take an account of the amount due by the plaintiff to the defendant under the agreement of the 5th of September, or otherwise; and to report as to the amount the defendant *received* or *should have received* from the sale, and what was due to the plaintiff after giving credit for what was due to the defendant under the agreement; (d) The right of appeal against the report of the Master was provided for, and further directions and costs were reserved.

The reference proceeded for some time when the plaintiff applied to the Master for leave to amend her statement of claim, which was allowed, in order, as the Master said in his report, to determine in this suit the actual question in controversy between the parties.

The amendment alleged that if the defendant had not received the whole or part of the purchase money, it was owing to his negligence, delay, and default, in not proceeding against the purchaser, whereby the defendant had rendered himself personally liable for it.

The defendant answered this allegation by setting up among other defences, that there was no binding agreement by the purchaser at the sale, and that the defendant could not compel him to carry it out, and that he had applied to the purchaser for payment which he refused; that he was

not bound to take proceedings against him at his own ^{Statement.} risk and expense or without indemnity; that the plaintiff had never offered indemnity, and he denied negligence, delay, and default.

The pleadings having thus been settled, the reference was proceeded with and concluded; and on the 15th of November, 1887, the Master made his report, in which he found that the sale was valid; that the defendant was personally liable to the plaintiff for the purchase money of the shares, and that there was a large sum due from the defendant to the plaintiff on the accounts between them.

The defendant appealed from this report, and on the 10th of January, 1888, ROSE, J., who heard the appeal, allowed it with costs.

On the 17th of April, 1888, the action was heard on further directions, and was dismissed with costs.

The plaintiff appealed, and the appeal came on to be heard before this Court, (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A.) on the 28th of November, 1888.

McCarthy, Q. C., and *P. McPhillips*, for the appellant.

W. Cussels, Q. C., and *F. R. Bull*, Q. C., for the respondent.

March 5th, 1889. MACLENNAN, J. A. :—

After the most careful consideration of the whole case, I am of opinion that the order of Mr. Justice Rose is right, and that there is no just ground on which the finding of the Master can be supported.

The sole ground on which the case can, if at all, be rested, is that made by the amended pleading, and on which it is rested by the Master—namely, that by his negligence, delay, and wilful default, in not compelling the purchaser to pay as he could and ought to have done, the defendant has made himself liable for the purchase money.

In the reasons of appeal, and in the argument before us, it was contended that the defendant was liable on an-

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other ground—namely, because he represented that he had received the money, that the inference to be drawn from his letters was that he had in fact received it. This is on the ground of estoppel. In my judgment there is nothing whatever to support it. It is not pleaded, although every opportunity was given for doing so, and I think the proof is as defective as the pleading.

[The learned Judge stated fully the evidence relied on in support of the contention as to estoppel and continued:]

There is, in my judgment, not to be found in this case any one of the several essential elements to constitute a case of estoppel against the defendant, so as to make him liable for the money on that ground although he never received it.

I now come to the main ground on which the defendant is sought to be made liable—namely, that of wilful neglect and default.

The judgment ordering the reference, after directing an enquiry as to the validity of the sale, directs the Master to report what amount the defendant received or should have received therefrom. This is not the usual form of a judgment charging a defendant with wilful neglect and default, but as it is a judgment by consent, we must suppose that the parties settled carefully the language they used defining the enquiry which was to be made; and I think that language ought to be attended to in considering the Master's report.

The enquiry then before the Master, was what the defendant received or should have received.

He received nothing as we have seen, and the question is, what he *should* have received. I think that means what he was under some legal or equitable obligation or duty to the plaintiff to receive, but failed to receive by neglecting or disregarding his obligation; what his duty to the plaintiff required him to receive, but which he did not receive.

In *Thomas v. Quartermaine*, 18 Q.B.D., at p. 694, Bowen, L. J., says, that in order to find whether a person has been

guilty of negligence, the first step must be to consider what his duty is, which it is alleged he has broken, for "the ideas of negligence and duty are strictly correlative, and there is no such thing as negligence in the abstract; negligence is simply neglect of some care which we are bound by law to exercise towards somebody."

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The duty which it is said the defendant neglected was that of taking proceedings against the purchaser. It is said if he had taken proceedings the money would have been recovered, and that by the neglect of the defendant's duty the purchase money was lost.

I deny that it was the defendant's duty to take proceedings, and I think it is not proved that if he had taken them the debt would have been recovered.

There are three courses, any one of which the defendant might have taken. He might have notified the purchaser to pay on a named day, and in default, have rescinded the sale; but it is clear he could not safely have done this without the consent of the plaintiff.

He might have sued for the whole of the purchase money, but upon a very careful examination of the evidence, I think it is not made out that the money could have been recovered. On the contrary my conclusion is that but little, if anything, could have been recovered.

Another action that might have been brought would have been to have the shares resold, and the deficiency paid by the purchaser. The probable result of such a suit as that, so far as recovering the deficiency is concerned is, in my opinion, just as doubtful and uncertain on the evidence as that of the other.

I think the Courts only hold persons liable by reason of neglect of duty for the loss thereby occasioned. It is a principle of indemnity, and it is, in my judgment, very extraordinary that, although the shares are still in hand as security for the debt, and although the debtor is still liable, and the remedy against him unimpaired, the defendant has been held responsible for the whole debt as if it were irrecoverably lost by his misconduct.

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J.A.

Now, I deny that the defendant was under any obligation, without request from the plaintiff, to bring an action against the purchaser.

It may well be considered doubtful, on the authority of *Mortimer v. Bell*, L. R. 1 Ch. 10, whether, having regard to the bidding at the sale on behalf of the plaintiff by Wells, an action against the purchaser would have been successful; but even if that were clear, it must be borne in mind that the defendant was only a mortgagee. He held the shares not as a trustee, but as security for his debt. The plaintiff was his debtor, and the debt was over-due. The defendant was taking steps to recover his debt, and the debtor says he was under the obligation to her of exercising diligence and activity in pursuing the purchaser and making him pay even to the extent of suing him. What was the plaintiff's obligation at the same time? Every day and every hour of that time, it was her duty to pay her debt to the defendant, to relieve him of the necessity of suing the purchaser, and to take the burden of doing so upon herself. The sole reason the defendant could have for suing the purchaser, was the neglect and default and delay of the plaintiff in not paying her debt. It was her duty every moment to pay it, and she had a right to pay it at any moment. Why was he to assume that she might not or would not at any moment do what was both her right and her duty? These being the relations of the parties, I think it is clear on principle that there was and could be no duty from the defendant to the plaintiff to sue the purchaser. He was no more obliged to sue the purchaser than to sue the plaintiff. He could wait for his debt, without suing the plaintiff, and I think he could also wait, and not sue the purchaser. I suppose no one would contend that the defendant was under any duty or obligation to the plaintiff to take any steps in the first instance to realize his debt out of the shares. The company might fail and the shares might become worthless, yet he would be blameless. I am unable to see why his duty and obligation are in any way different after a sale has

been made with the knowledge, consent, and approval of the debtor. She could have sold the shares herself and paid the debt; they are now sold with her concurrence; can the defendant's duty be different in the one case and the other? I think not. And the reason is, that it is the debtor's duty to pay the debt, and he can then realize the security himself. It is still a case of security, its form only being changed. It is still redeemable.

The plaintiff contends that the defendant should have sued for this purchase money; but why did she not do so herself? It is clear she could have done so. She could have paid the defendant's debt, and then have sued: but since the Judicature Act, she could also have sued in her own name without paying the debt.

I think the fact that the plaintiff herself might have sued the purchaser, is a complete answer to this action. The action is for damages or for the loss occasioned because the defendant did not sue the purchaser for the money. If the plaintiff could have done that herself, how can she say she has sustained loss or damage by the defendant not doing it. Has the loss not resulted from her own neglect rather than from the neglect of the defendant?

In *Paddon v. Richardson*, 7 D. M. & G. 563, this very point is decided both by Knight Bruce, and Turner, L.JJ. That case, like this, was a suit to make defendants liable for not collecting money, and Knight Bruce, L. J., held that plaintiff must fail because he might himself have sued for the debt. At page 584, Turner, L. J., says: "The bill is in effect to charge Richardson and his estate for a breach of trust in having permitted them (the moneys) to remain in the hands of Sir William Magnay, but if there was this breach of trust, why did not the plaintiff John Edward Paddon himself sue to recover the moneys? He was competent to do so, and I am at a loss to see what right he can have to make his trustee liable for not having done what he might have done for himself."

It is true this case is observed upon by Lord Romilly, in *Horton v. Brocklehurst*, (No. 2), 29 Beav. at p. 511, as not

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applicable to a case where if the trustee had done his duty from the beginning, no suit would have been necessary. But that observation is not applicable to the present case, for the very breach of duty complained of is the not bringing of the action.

No doubt the defendant might have sued, but he had the shares still as his security. He had no funds with which to carry on a suit, and it is clear if he failed in the action he could not have charged the plaintiff with the costs, or have added them to his debt, without her consent. If the plaintiff desired him to sue, she should at least have requested him to do so, and have put funds in his hands for the purpose: *Cocks v Gray*, 1 Giff. 77; *Job v. Job*, 6 Ch. D. 562.

But even if a trustee for sale ought in such a case as this, to have sued, a mortgagee is not a trustee in the ordinary sense. In *Warner v. Jacob*, 20 Ch. D. 220, Kay, J., after reviewing the authorities, says, at p. 224: "The result seems to be that a mortgagee is, strictly speaking, not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realize his debt. If he exercises it *bonâ fide* for that purpose, without corruption or collusion with the purchaser, the Court will not interfere."

In *Martinson v. Clowes*, 21 Ch. D. at p. 860, North, J., says: "The law, as to the position of a mortgagee exercising a power of sale, is, in my opinion, correctly laid down by Mr. Justice Kay in *Warner v. Jacob*. The language of Vice-Chancellor Stuart in the case of *Robertson v. Norris* no doubt goes considerably further in treating the mortgagee as a trustee; but that language goes beyond anything to be found in the cases relied upon as authorities for it, as was recently pointed out by the Court of Appeal in the recent case of *Nash v. Eads*."

The nature of a trustee's duty, and the degree of negligence for which he may be responsible, is discussed in Smith on Negligence, 2nd ed., p. 111, referring particularly to *Speight v. Gaunt*, 22 Ch. D. 727, and S. C. 9 App. Cas.

1, 15, and *Wilson v. Lord Bury*, 5 Q. B. D. 518; see also *Lewin on Trusts*, 8th ed., p. 908; *Palmer v. Jones*, 1 Vern. 144; *Pybus v. Smith*, 1 Ves. at p. 193.

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MACLENNAN
J.A.

But, as I have said, the defendant was not a trustee, but a mortgagee, and the responsibility of a mortgagee is thus stated in *Fisher on Mortgages* 4th ed., sec. 1454: "The mortgagee is not usually required to account for more than he has received * * unless it can be proved, that but for his gross default, mismanagement, or fraud, he might have received more.

"Such may be evidenced by his refusal or removal of a sufficient tenant who offered or paid a certain rent; his refusal, in combination with the tenant, to receive the rent, or to take out execution on a judgment in ejectment; or his making an improper use of his security, by suffering the mortgagor himself to take profits to the prejudice of his other creditors, or where he is bankrupt, of his trustee.

"But in these cases the proof must be distinct. * * And it is the duty of the mortgagor, if he has the opportunity, to give notice to the mortgagee, that the estate can be made, and to assist him in making it, more productive; which if he omit to do, and lie by, making no objection to the mortgagee's proceedings, he cannot afterwards charge him with mismanagement."

It thus appears that even in the case of a mortgagee in possession, who is always chargeable for wilful neglect and default, the case must be one of gross default, mismanagement, or fraud, to make him liable.

The present is not a case of a mortgagee in possession who has turned the mortgagor out of the management of his estate and taken it into his own hands, and who, therefore, cannot complain of a strict account being required of his acts, but it is a case in which the mortgagor was informed of everything, could have acted herself, and never suggested to the defendant to take the proceedings she now complains he neglected to take.

In my judgment, it is out of the question to charge the defendant in this case as if he had been a mortgagee in

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possession guilty of wilful neglect and default: *Noyes v. Pollock*, 32 Ch. D. 53.

There is still another way in which the question of the liability of the defendant may be tested and put in a strong light.

If the defendant had any such duty as is supposed resting upon him, namely, of taking proceedings against the purchaser, it follows that the plaintiff could have brought suit in equity against the defendant to compel him to perform his duty by taking those proceedings: Lewin on Trusts, 8th ed., p. 853, and cases cited. Now, if this plaintiff had brought such a suit immediately, or soon after the sale, what would have been the answer? It would have been: 1. You have no need of the relief you ask, because in the altered state of the law there is nothing to prevent yourself from suing. 2. You owe the defendant a debt which you ought to pay; you have the remedy in your own hands; pay the debt, and you can then do what you please with the purchaser in your own name. 3. You owe the defendant a debt. He who seeks equity must do equity; you can get no relief in a Court of Equity without discharging your legal obligation to the defendant.

The result is that the defendant could not be compelled to sue except on the terms of his debt being paid, and it follows that there was no obligation on him to do so except on the same terms.

For these reasons I am brought to the conclusion that the judgment of Mr. Justice Rose is right and ought to be affirmed, and that the appeal ought to be dismissed.

OSLER, J. A. :—

I am unable to extract from the evidence any legal ground on which to base the defendant's liability to account to the plaintiff on the footing of having received or negligently omitted to receive the purchase money of the shares in question, and therefore for the reasons stated in the judgment of my learned brother Maclennan, I think the

judgment of Mr. Justice Rose should be affirmed. It is a case in which I think the appeal may properly be dismissed without costs.

Judgment.

OSLER
J.A.

HAGARTY, (C. J. O.):—

This case has given to all the members of this Court much anxious consideration, and we have been unable to arrive at a unanimous decision.

For a long time I thought we could uphold the plaintiff's claim. It is possible that a strong sense of the harsh and unfair conduct of the defendant, and a desire to save the plaintiff from a heavy loss may have influenced the judgment I had first formed.

I feel compelled, however, to hold that the view of my two learned brothers who precede me is sound.

The defendant held the stock vested in himself subject to plaintiff's right to have it transferred to her on making certain payments. This right she still holds, and the defendant fully admits his liability to transfer it to her on her making such payments. The apparent fall in its value has caused all the difficulty. Treating the contract as in substance a mortgage transaction with a power of sale, will not, I fear, help the plaintiff in her present claim. If the sale at seventy-one cents on the dollar, could have been effected, she would have received several thousand dollars.

I feel bound to hold that such sale has proved abortive, so far as not producing the named price. I thought for some time that there was sufficient evidence from the facts, and the conduct and correspondence with the defendant during the two months following the sale, to have fixed him with the value or price at which the property was sold.

But I find that I cannot adopt this as the legal result of all that was done. The plaintiff by her agents was aware of all that occurred at and following the sale; and although it has turned out so much to her disadvantage that the sale at seventy-one cents has proved abortive, still

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her rights of property remain unaffected. The substantial injury to her is not that she has lost any right, but that, as appears in evidence, the saleable or market value of the stock has been steadily declining.

The defendant was not bound to sell at the time announced, or at any other time. If after commencing the sale, he had chosen to stop it, and forbade the auctioneer proceeding, he would not have been liable as here claimed.

If the stock instead of declining had risen in value from the day of the auction till the day of issuing the writ, the plaintiff would not have sustained any substantial damages, as her right under the agreement remained unaffected. Unless, therefore, there be sufficient evidence to make the defendant liable for a failure to sell on the 11th of May, and consequently to hold him bound to indemnify her against the loss by the falling of the market, I cannot see her remedy.

I think the appeal must be dismissed, but we should mark our sense of the defendant's apparently disingenuous conduct by refusing costs to him. This decision is not to affect any other proceeding the plaintiff may be advised to take.

BURTON, J. A. :—

[The learned Judge stated the facts and continued :]

The Master's report was, on appeal to Mr. Justice Rose, in effect reversed on the ground that the defendant, although recognized by the learned Judge as a trustee, was not liable to take proceedings to enforce the contract without request, and an indemnity, neither of which was shewn, and that there was no finding of damage resulting from delay, and that the plaintiff could have had either the stock or the benefit of the contract, and she demanded neither.

The learned Judge has come to this conclusion on the assumption which, with great deference, is, I think, an erroneous one : that this was a mere option to purchase,

and that to entitle herself to recover in an action, she must shew that all conditions precedent were observed on her part. I express no opinion of what her rights might have been under such a state of facts, but in the view which the Master took, amply supported by the evidence, that the defendant was mortgagee of the plaintiff's property, I think no sufficient ground existed for interfering with the award, and without enquiring whether the finding of the arbitrator that the defendant was really the purchaser of the stock was right, I think that he ought to be held estopped by his conduct from saying that the sale was not a sale for cash, so that if he chose to give credit instead of exacting cash, as was made a peremptory condition of sale with every other intending purchaser, it was something he was not authorized to do without the plaintiff's consent, and he was properly held liable for the amount for which the stock was sold.

Judgment.

BURTON
J.A.

I do not think it necessary to discuss the question of the relative rights of the plaintiff and defendant if we had to deal with the simple fact of a sale made in good faith, and a refusal by the purchaser to carry out the sale.

What we have to deal with under this decree is, whether there was any evidence to warrant the Master in arriving at the conclusion that the defendant did receive, or might with due diligence have received, the purchase money for the stock.

Looking at all the facts, can it be said that there was no evidence to lead to such a conclusion?

[The learned Judge discussed the evidence and continued:]

Regarded in the light in which I am now looking at it, viz.: that in substance this was purely a question between mortgagor and mortgagee, and looking also at the fluctuating value of this description of property, I think the defendant has estopped himself after a delay of two months, and after putting the plaintiff to rest, from disputing that there was a completed sale, as it was his duty towards the plaintiff, especially having regard to the rigid

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BURTON
J.A.

terms of the sale, to have notified her at the earliest possible moment that the sale had for any reason become abortive. I do not care to enquire whether there was or was not any legal obligation upon him of that kind, but there was, beyond all question, an obligation not to lead her to believe for that long period that the sale had been carried out; whether or not he might have remained passive is another question.

We cannot, in considering his responsibility, avoid looking at all the circumstances attending the sale, and whilst I think he was not justified in offering the whole of the stock in one lot, but was bound to consider the interests of the plaintiff, and whilst I quite admit that that has been condoned by her, so that she cannot now complain on that score, it furnishes strong evidence to show that the defence now set up was an afterthought, and if the learned arbitrator, who saw the witnesses and heard the evidence more in detail than we have it in this book, has found in it sufficient to warrant his conclusion on the ground of estoppel or otherwise, we should not be astute to disturb his finding.

The defendant led the plaintiff to believe, either that he had received the money for the sale, or something which he was willing to accept in lieu of money. In a conversation with Wells some two or three weeks before the commencement of the action, he mentioned that his reason for not paying over the money was that he had received notice of a claim by creditors of Brown & Wells, and said he thought he would pay the money into Court, and I do not find any intimation that there was a difficulty with the purchaser. The plaintiff had a right upon the correspondence to assume, either that the money had been paid, or that the mortgagee had, without consulting her, given time to the purchaser.

That the stock has now fallen, and had so fallen when the action was commenced, is clear; so that I am at a loss to understand Mr. Justice Rose's statement that no damage was shown. I think the learned arbitrator was

quite warranted in arriving at the conclusion he did, and that the award was fully warranted by the evidence, and is in accordance with justice and the true merits of the case, and I am of opinion that the order appealed against should be reversed, with costs.

Judgment.
BURTON
J.A.

*Appeal dismissed without costs,
BURTON, J.A., dissenting.*

REGINA V. WASON.

Constitutional law—Criminal law—Criminal procedure—B. N. A. Act, sec. 91, sub.-sec. 27—51 Vic. ch. 32 (O)—52 Vic. ch. 15 (O).

The "Act to provide against frauds in the supplying of milk to cheese or butter manufactories," 51 Vic. ch. 32 (O), though penal in its nature, does not deal with criminal law within the meaning of section 91, sub-section 27, of the B.N.A. Act, but merely protects private rights and is *intra vires*.

So also the "Act respecting appeals on prosecutions to enforce penalties and punish offences under Provincial Acts," 52 Vic. ch. 15 (O), is not legislation dealing with criminal procedure within the meaning of that sub-section and is *intra vires*.

Judgment of the Queen's Bench Division, 17 O. R. 58, reversed.

Whether proceedings to quash a conviction under an Ontario Act should be taken before a single Judge, or a Divisional Court. *Quere.*

THIS was an appeal from the judgment of the Queen's Bench Division, reported 17 O. R. 58. Statement.

The defendant was convicted under the "Act to provide against frauds in the supplying of milk to cheese or butter manufactories," 51 Vict. ch. 32 (O), of sending to a cheese factory at the village of Warsaw milk from which the cream had been partially removed, and was fined \$20 and costs, and in default of payment was ordered to be committed to jail for ten days. The conviction was removed by *certiorari* into the Queen's Bench Division and on the 4th of February, 1889, was by that Court quashed on the ground that the Act in question was *ultra vires*.

The Act provides by section 1 that no person shall knowingly and wilfully sell, supply, bring or send to a

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cheese or butter manufactory, etc., milk diluted with water, or in any way adulterated, or milk from which cream has been taken, etc., without distinctly notifying in writing the owner or manager, etc., that the milk so sold, etc., has been so diluted with water or adulterated, or had the cream so taken from it, etc., and by section 4 that any person who violates any of the provisions of the Act shall upon conviction before any justice or justices of the peace forfeit and pay a sum of not less than \$5 nor more than \$50, together with the costs of prosecution, and in default of payment shall be liable to be committed to jail with hard labour for any period not exceeding six months, unless the penalty and costs be sooner paid. Section 5 provides that the owner or manager of a cheese or butter manufactory may have any milk sold or supplied to the manufactory tested.

By 52 Vic. ch. 15 (O.), assented to on the 23rd of March, 1889, it is provided that an appeal to the Court of Appeal shall lie from a judgment or decision of the High Court, or a Judge thereof, upon any application to quash a conviction made under a statute of the Legislature of Ontario creating an offence punishable by summary conviction before a justice, provided that the Attorney-General for Ontario, or the Attorney-General for Canada, certifies his opinion that the decision involves a question on the construction of the British North America Act, and that the question is of sufficient importance to justify the case being appealed; and certain provisions are made as to the steps to be taken in bringing on the appeal for hearing.

Under the provisions of this Act the Attorney-General for Ontario certified that he was of opinion that the decision of the Queen's Bench Division in this case involved a question on the construction of the British North America Act of sufficient importance to justify the case being appealed to the Court of Appeal, and an appeal was accordingly taken, and came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, J.J.A.) on the 17th of October, 1889.

The respondent took the preliminary objection that Statement. there was no right of appeal, the Act assuming to give that right of appeal being *ultra vires*, and the Court directed that this question should be argued with the appeal on the merits.

E. Blake, Q.C., (with him *Irving*, Q.C.) for the appellant. In order to properly decide the matters involved in this appeal it is necessary to bear in mind propositions almost axiomatic as to the proper way to view questions arising under the Constitutional Act. The first is that all reasonable presumptions are to be made in favour of the validity of the Act in question. If one available construction will maintain, while another will destroy it, the former is to be chosen. An example of this is to be found in the case of *City of Fredericton v. The Queen*, 3 S. C. R. 505, where the title and preamble of an Act were rejected, as indicative of a legislative object said to be *ultra vires*, while the enacting clauses were upheld, they being within the authority of Parliament under its power to regulate trade and commerce. Then it is necessary also in the consideration of the Constitutional Act to look even more closely than commonly at the whole law, to avoid detached views and the microscopic investigation of isolated words and phrases. It is also clear that all powers reasonably required in order to the full execution of powers specifically given are to be liberally implied.

Now the efficacy of all laws depends upon their sanctions. A law without a sanction is *brutum fulmen*, so that the power to make a law would necessarily imply a power to provide for the enforcement of the law and for the execution of the sanction. It is true that in the British North America Act there is the express power to affix certain sanctions, but this power was given *ex majori cautela*, and it is clear that in addition to this expressed power further power must be implied. In cases of divided sovereignties, such as ours, it would seem to be the obvious course to assign to each sovereignty its own adequate and independent measure of executive, legislative, and judicial

Argument.

power so as to make each complete in itself, but this plan has not in our constitution been followed. The bulk of the whole subject of public justice goes to the Province, and to the Dominion the appointment and payment of the Judges and legislation relating to criminal law and criminal procedure, but not including the organization of Courts; so that stopping here there might be an absolute failure of the execution of the Dominion laws, because the Province might through carelessness or design omit to create a Court with the requisite jurisdiction, thus leaving the law a dead letter. To avoid this contingency the Dominion was authorized to erect additional Courts for the better execution of its laws. The reasonable conclusion is that the Provinces were not to be left defenceless and that they also have power to complete and execute their laws irrespective of Dominion action. It is clear that the contemplated range of provincial laws must be very wide indeed. The Provinces have power to deal with nearly all things touching the rights and relations of men, and to any law within that range may attach highly penal sanctions. It is true that "criminal law," whatever that may be interpreted to mean, is reserved from their control; but it cannot be contended that everything that was punishable under the laws as they stood at the date of Confederation then became Dominion criminal law. The true principle is that a law which, if it had not then been already passed, could have been thereafter passed by the Provinces, would not become Dominion criminal law at the time of Confederation. It is obvious that the Province can if it thinks fit attach to laws within its competence sanctions not only such as are generally appropriated to civil injuries, but such as are ordinarily restricted to criminal matters, and is not restricted to mere legislation for the purpose of providing satisfaction, restitution, or compensation, to an individual aggrieved. "Criminal law," therefore, as used in the 91st section of the Constitutional Act cannot be interpreted in its widest sense unless we destroy a very large proportion of the powers intended to

be given to the Provinces by the 92nd section. The juris- Argument.
diction of the Provinces and the Dominion overlap. The Dominion can declare anything a crime but this only so as not to interfere with or exclude the powers of the Province of dealing with the same thing in its civil aspect, and of imposing sanctions for the observance of the law ; so that though the result might be an inconvenient exposure to a double liability, that possibility is no argument against the right to exercise the power. The Act now in question must be regarded as simply an Act relating to "property and civil rights within the Province" with certain provisions as to sanctions necessary in order to enable the Act to be properly enforced, and cannot be said to be an Act relating to criminal law, at any rate within the meaning of the Constitutional Act. The provisions of the Act show clearly that this is its end. It deals only with the particular trade or business, and only with contracts between individuals, and does not deal at all with a wrong against the community which could in the ordinary sense of the word be looked upon as criminal. If this Act is not legislation relating to "criminal law" within the meaning of section 91, then the Act by which the right of appeal is given is not an Act relating to "criminal procedure" within the meaning of that section. The obvious intent of that section was to provide for the creation of a common criminal law, and there could not have been any intent to hand over to the Dominion, entrusted only with Dominion concerns and authority, the exclusive authority to create procedure for the execution of purely local laws. The power to legislate upon a particular subject includes the power to provide the necessary procedure for the execution of the law: *Cushing v. Dupuy*, 1 Cart. 252; *Pope v. Griffith*, 2 Cart. 291; *Ex parte Duncan*, 2 Cart. 297; *Page v. Griffith*, 2 Cart. 308; *Coté v. Chauveau*, 2 Cart. 311; *Regina v. Boardman*, 1 Cart. 676; *Regina v. Lawrence*, 1 Cart. 742.

(*Irving, Q. C.*, was proceeding to argue certain techni-

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cal objections to the validity of the conviction when these objections were withdrawn by the respondent.)

E. B. Edwards, for the respondent. This Act is clearly an Act relating to criminal law. Certain things are defined to be offences and certain punishments are imposed for these offences. The Act itself relates to private rights to a certain extent, but many other Acts admittedly part of the criminal law deal in the same manner with private offences and not with public wrongs, as for instance: The Malicious Injury to Property Act, The Libel Act, etc. The expression "criminal law" in the 91st section must be interpreted as applying to criminal law as then recognized, that is to all matters which were offences at that time under any statutes then in force. Under the Adulteration Act in force at the time of Confederation a matter of the kind now in question was a criminal offence, and at the time of Confederation the Dominion assumed jurisdiction over that particular offence so that the Province cannot now come in and deal with the same offence and affix a penalty. The Dominion having declared a certain act to be a crime, the jurisdiction of the Province is forever excluded. At any rate this offence would be punishable under R. S. C. ch. 173, sec. 25. The right to complain of an offence under this Act is not limited to persons having an interest in the transaction. There is on the contrary a general right of prosecution, so that clearly what is being dealt with is an offence against the public. Before the Act was passed there was a civil remedy in existence, the person suffering by conduct of the kind now in question having his right of action. This Act is an attempt to punish the civil wrong as a crime against the public and the attempt is invalid. The Act attempting to give a right of appeal in a case of this kind is also invalid, and no appeal lies: *Regina v. Eli*, 13 A. R. 526.

E. Blake, Q. C., in reply.

March 4th, 1890. HAGARTY, C. J. O.:—

Judgment.

HAGARTY
C.J.O.

Two questions are presented for decision:

1. Whether the Ontario Act, 51 Vic. ch. 32: "To provide against frauds in the supplying of milk to cheese or butter manufactories" is beyond the right of the Legislature to pass.

2. Whether an appeal lies to this Court against the judgment of the Queen's Bench Division quashing a conviction under that Act.

On the main question the subject of legislation would certainly seem to be within the scope of Provincial legislation, being for the insuring of fair dealing on the part of persons supplying milk for manufacture into cheese or butter at the numerous establishments for that purpose throughout Ontario.

The Act was passed on the 23rd of March, 1888, adding many provisions to R. S. O. (1887), ch. 207.

Section 1, on which the conviction is based, reads thus:

"No person shall knowingly and wilfully sell, supply, bring, or send to a cheese or butter manufactory, or the owner or manager thereof, to be manufactured, milk diluted with water, or in any way adulterated, or milk from which any cream has been taken, or milk commonly known as 'skimmed milk,' without distinctly notifying, in writing, the owner or manager of such cheese or butter manufactory, that the milk so sold, supplied or brought to be manufactured has been so diluted with water, or adulterated, or had the cream so taken from it, or become milk commonly known as 'skimmed milk,' as the case may be."

The material part of the conviction reads thus:

"Be it remembered that * * * John Wason, Senior, is convicted before me, * * * for that he, the said John Wason, Senior, at the Township of Dummer, in the said County of Peterborough, on the fourth day of June, in the year of Our Lord, one thousand eight hundred and eighty-eight, knowingly and wilfully, did send and supply to the Warsaw Cheese Factory, at the Village of Warsaw,

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in the Township of Dummer, in the said County of Peterborough, a quantity of milk, from which a part of the cream had been removed or taken without notifying, in writing or otherwise, the owner or manager of said cheese factory that a part of the cream had been so removed or taken off the milk so sent and supplied to the said cheese factory, and I adjudge the said John Wason, Senior, for his said offence to forfeit," etc.

The learned Chief Justice of the Queen's Bench considers that certain provisions quoted by him from the Adulteration Act, R. S. C. ch. 107, would cover what is prohibited by the section of the Ontario Act above cited.

He refers to certain sections from the Dominion Act:

"The doing what is prohibited by this section was not at the time of the passing of the Act an indictable misdemeanour, nor was it regarded as an offence against the criminal law, except under the Adulteration Act, R. S. C. ch. 107, sec. 15, which provides that: 'If milk is sold, or offered or exposed for sale, after any valuable constituent of the article has been extracted therefrom, or if water has been added thereto, or if it is the product of a diseased animal or of an animal fed upon unwholesome food, it shall be deemed to have been adulterated in a manner injurious to health, and such sale, offer or exposure for sale shall render the vendor liable to the penalty hereinafter provided in respect to the sale of adulterated food; except that skimmed milk may be sold as such if contained in cans bearing upon their exterior, within twelve inches of the tops of such vessels, the word 'skimmed' in letters of not less than two inches in length, and served in measures also similarly marked; but any person supplying such skimmed milk, unless such quality of milk has been asked for by the purchaser, shall not be entitled to plead the provisions of this section as a defence to or in extenuation of any violation of this Act.

2. Nothing in this section shall be interpreted to permit or warrant the admixture of water with milk, or any other process than the removal of cream by skimming.

Section 22 imposes a penalty upon 'every person who wilfully adulterates any article of food or any drug, or orders any other person so to do,' and section 23 imposes a penalty upon 'every person who, by himself or his agent, sells, offers for sale, or exposes for sale, any article of food or any drug, which is adulterated within the meaning of this Act.'"

He adds that the passing of the Adulteration Act by the Dominion Parliament is no reason against the passing by the Ontario Legislature of the section in question if properly within their powers, but he considered that "the primary object of the Act is to create new offences and to punish them by fine and in default of payment by imprisonment, and this is its true nature and character."

I think the learned dissenting Judge points out the true distinction between the two enactments. He points out that at the time of Confederation it was not an offence to deliver skimmed milk without revealing the fact.

48 Vic. ch. 67, (D.) passed in 1886, seems to have been the first general Act. Of course, if a man sold skimmed milk asserting it to be unskimmed he might be charged with obtaining its price on that false pretence.

The conviction here is for wilfully bringing the milk from which the cream had been abstracted without notifying the owner or manager, etc. etc.

We are not very distinctly told the precise way in which the persons bringing milk to the factory are remunerated. The article they bring is to be manufactured into cheese. Whether the bringer is to be ultimately remunerated by so much cheese or by money after realization of net profits of sale or otherwise does not appear. But as the case is presented to us, I do not see how the defendant's alleged offence could be easily reached under the Adulteration Act, which seems aimed at the seller of goods in the ordinary dealings of vendor and purchaser.

I am not satisfied that this was milk "sold or offered or exposed for sale" in the sense of that statute, nor can I believe that the existence of such a general Act must pre-

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vent the Local Legislature from regulating the dealings between these cheese factories and their patrons or customers in such a special manner as this Act provides. The industry sought to be regulated is one of vast and increasing importance, and it may be important to its interests to have special local legislation to meet its requirements.

The regulations prescribe that the bringer in of skimmed milk must give a written notice that it has been so skimmed. This is a special provision. So also as to keeping back the "strippings." (Section 2.)

Then power is given to the manager (section 5) to compel inspection and submission of cows to a milk test and there are other provisions specially adapted to insuring fair dealing in this particular business.

My learned brother Street says with much force: "Is it an Act constituting a new crime for the purpose of punishing that crime in the interest of public morality? Or is it an Act for the regulation of the dealings and rights of cheese makers and their patrons, with punishments imposed for the protection of the former? If it is found to come under the former head, I think it is bad as dealing with criminal law; if under the latter, I think it is good as an exercise of the rights conferred on the Province by the 92nd section of the British North America Act. An examination of the Act satisfies me that the latter is its true object, intention, and character. It is not made an offence to deliver skimmed, sour, tainted, or adulterated milk to the cheese maker, as we should expect to find in an Act intended for the public interest; the offence consists in doing so without notifying the fact to the cheese maker; he is the person injured by the breach, and intended to be protected by the notice."

If we hold this Act to be beyond the powers of the Ontario Legislature, I do not see how our judgment must not necessarily impeach the validity of a hundred similar enactments imposing penalties for the non-observance of directions and requirements of the Legislature on subjects clearly of a local character.

Of course, the frequency of such legislation does not prove its legality. But, it may be asked, how would it be possible to legislate on confessedly local subjects within the authority of our Legislature if no power to enforce obedience to the enactment can be conceded?

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HAGARTY
C.J.O.

If this be an Act merely to create offences in the interest of public morality, it may be argued that it is trenching on the forbidden ground of "Criminal Law."

If it be, as I think it is, an Act to regulate the business carried on at these cheese factories, with reasonable penalties to ensure obedience to its regulations, I consider it to be within the powers given by the constitution to the Provincial Legislature.

I have had occasion, in considering the second question, as to the power of this Court to hear the appeal, to examine several authorities which also distinctly bear upon the first question.

The appeal comes to us under 52 Vic. ch. 15 (O.) (passed 23rd of March, 1889). The Act is declared not to apply to any prosecution under any Dominion Act nor to any prosecution except for an offence the penalty or punishment for which is imposed under a Provincial Act, or statute in force therein, and within the legislative authority of the Province as regards such penalty or punishment.

Section 3 gives an appeal to this Court against a judgment quashing a conviction under an Ontario Statute: Provided the Attorney-General grants his *fiat* therefor.

We have now to consider the objection that the appeal cannot be properly entertained as this right of appeal is a matter of "Criminal Procedure."

In *Cushing v. Dupuy*, 1 Cart. 252, in the Privy Council, it was objected to the Insolvent Law that it interfered with civil procedure exclusively assigned to the Provincial Legislatures. It was answered in their Lordships' judgment that it was impossible to advance a step in a system of insolvency without interfering with civil procedure, that "procedure must necessarily form an essential part of any law dealing with insolvency." They

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say it is to be presumed that the Imperial Act necessarily implied the power to interfere with procedure so far as a general law of the proper cognizance of Parliament might affect it. To apply this decision : The Local Legislature has the exclusive power to legislate on subjects within its jurisdiction and to punish by fine and imprisonment. It must be held, as it has been, that they must have the power to enforce obedience by penalties of fine and imprisonment, on conviction by magistrates, etc. This may be called, in a sense, criminal procedure, and so may the giving of the right to appeal from one Ontario Court to another.

But, notwithstanding the reservation of criminal procedure to the Dominion Parliament, must we not hold that there must be a necessary implication of power to the Legislature so far to regulate criminal procedure (if that be its proper name) as to provide for the course of trial and adjudication of offenders against its lawful enactments ?

I think we can well keep the two jurisdictions distinct, and as to each to adhere to the rule that where either has the right to legislate on a named subject, it must by necessary implication be held that all powers are given fully to carry out the object of the enactment although subjects such as civil rights, and procedure, civil or criminal, may be apparently interfered with. The exclusive right to deal with the specified subjects remains wholly unaffected—the carrying the legislation into practical effect and providing necessary penalties for its observance is alone in question.

The point before us has been dealt with in the Province of Quebec.

In *Pope v. Griffith*, 2 Cart. 291, the late Mr. Justice Ramsay held that the Legislature has power to regulate procedure affecting penal laws which such Legislature has authority to pass. The Quebec License Act took away the *certiorari* to bring up a conviction. He held this was lawful. “In one sense of the word the act of which the de-

fendant is accused may be a crime; it is equally plain it is not a crime in the sense of sub-section 27 of section 91, which speaks of the criminal law. Sub-section 15 of section 92 gives the Local Legislature power to impose penalties, fine, and imprisonment, to ensure obedience to its laws." He adds: "What can be more local than the procedure to give force to a local law? * * The powers are perfectly distinct. Parliament makes the laws of procedure affecting the criminal law which it enacts, each of the Legislatures makes the laws of procedure affecting the penal laws which they enact respectively."

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In *Ex parte Duncan*, 2 Cart. 297, the late Mr. Justice Dunkin takes the same view. His reasoning seems to me to be sound and logical. I make one extract from his able judgment: "Whatever infractions of law, whether as to matters of Dominion or Provincial legislation, Parliament sees fit to designate as crimes, it--and it alone--can so declare, and as such punish; and to that end regulate procedure. Whatever infractions of any Provincial law coming within the purview of this 92nd section Parliament may not see fit thus to deal with, the interested Province may punish by fine, penalty, or imprisonment; but its so doing does not make the offence to be thus punished a crime, nor the procedure laid down in order to its punishment procedure in a criminal matter. On the contrary, such whole matter must remain a civil matter, within what is here the true meaning of these respective terms."

Page v. Griffith, 2 Cart. 308, before Mr. Justice Sanborn, is to the like effect.

Coté v. Chauveau, 2 Cart. 311, before Mr. Justice Casault, adopts the same view.

In *Regina v. Bradshaw*, 38 U.C.R. 564, 2 Cart. 602, before Mr. Justice Gwynne, it was held that the provision in the Dominion Act, 32 & 33 Vic. ch. 31, sec. 66, allowing the parties on the trial of an appeal from a summary conviction under the Malicious Injuries to Property Act to dispense with a jury was not *ultra vires* or an interference with the constitution of the Court.

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The procedure under the Summary Convictions Act was of a general character over the Dominion and might well be held not to be beyond the power of Parliament as to criminal procedure.

Regina v. Boardman, 30 U.C.R. 553, 1 Cart. 676. By the Ontario License Act it was made an offence to compromise, compound or settle any offence against the Act and a punishment of three months in goal with hard labour was provided.

It was held by the late Sir Wm. Richards that such provision was *intra vires*, and that the words "The Criminal Law" and "including the procedure in criminal matters" did not mean that the Local Legislature had not the power to legislate so as to punish by fine and imprisonment with the view of enforcing the laws. He considered the enactment and the enforcement to be all within their powers. The mere "procedure" question was not apparently discussed as such but it is not overlooked in the judgment of the learned Chief Justice.

R. S. C. ch. 173, sec. 25, was urged against the right of appeal: "Every wilful violation of any Act of the Parliament of Canada or of the Legislature of any Province of Canada, which is not made an offence of some other kind, shall be a misdemeanour and punishable accordingly.

2. Whenever any wilful violation of any Act is made an offence of any particular kind or name, the person guilty of such violation shall, on conviction thereof, be punishable in the manner in which such offence is, by law, punishable."

This was relied on as shewing that the violation of this law was made a misdemeanour and indictable and within the criminal law and procedure. I think the exceptions above cited leave the violation to be punished as the particular Act provides, and the section apparently only applies to supply the possible omission of a specific punishment.

Regina v. Eli, 13 A. R. 526, cited by the respondent, was the case of a conviction under the Canada Temperance Act.

It merely decided that this Court could not entertain any such appeal.

A few days after the granting of the *fiat* for the appeal in this case the Dominion Parliament passed the Act, 52 Vic. ch. 43, a general enactment "to provide against fraud in the supplying of milk to cheese, butter and condensed milk manufactories." It is substantially directed against cases like those provided for in our Act, but the phraseology is different.

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We are not called upon to discuss its possible bearing on Provincial Legislation.

I think the appeal must be allowed.

BURTON, J. A. :—

This is an appeal from a judgment of the Queen's Bench Division, holding that an Act of the Provincial Legislature entitled "An Act to provide against frauds in the supplying of milk to cheese or butter manufactories," was *ultra vires* as coming within the class, "Criminal Law," reserved by the British North America Act exclusively to the Parliament of the Dominion, and raising the further question whether, if within the competence of the Provincial Legislature to enact, the enforcement of the penalties does not fall within the description of criminal procedure, and that the Act, therefore, of the Province which gives a right of appeal to this Court, is beyond the powers of the Legislature.

As to the first question.

Perhaps there is no rule more clearly and universally acknowledged in regard to the judicial construction to be placed upon statutes when the Courts are called upon to decide whether the subject matter dealt with is within the competence of the particular Legislature which passed them, than this; that in cases of doubt every possible presumption and intendment will be made in favour of the constitutionality of the Act in question, the presumption being that when the subject matter appears to be within the class of subjects assigned to the particular legislative body which is assuming to deal with

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it, the enactment is valid and constitutional, and that the presumption is not to be overcome, unless the contrary is clearly demonstrated ; in other words, it will not be presumed that the Legislature entrusted by the Confederation Act with these great powers will transcend its authority.

Applying this rule of construction to the present case, I should have thought it clear, but for the opinions of the majority of the Judges in the Court below, that the enactment was simply one for the regulation of a particular trade or business, and for the prevention of frauds in the manner in which it is conducted. Had the earlier sections of this enactment stood alone without the addition of the 4th section, it cannot admit of doubt that it would have been within the power of the Provincial Legislature under the comprehensive term "Property and civil rights."

How then can the fact that the Legislature has, in exercise of its powers to impose a penalty for enforcing the laws which it has power to make, imposed a penalty, convert that into a crime which was not so otherwise ?

I should have thought apart from the principle of construction to which I have referred, that the regulation of their dealings between the persons supplying milk, and the persons to whom it is supplied, was not only the primary object, but the sole object of the Legislature ; and that the 4th section was inserted as the usual mode adopted by the Legislature for the enforcement of its laws.

Some confusion has arisen from the lax use of the expression "crime," as applied to penalties inflicted by the Local Legislature for violation of its enactments. It was deemed sufficient in the arguments and decisions in which this laxity of expression has occurred to say:—Without entering into any minute enquiry as to whether these offences can be properly designated as "crimes," it is sufficient to say that they are not crimes within the meaning of section 91 of the Imperial Act.

The words used both in sections 91 and 92 are necessarily very general, but those in 91 were intended to apply to subjects of national and general concern. We are all aware

that for many years after Confederation discussions were constantly arising as to the scope of the words "Regulation of trade and commerce," it being frequently contended that they were sufficiently general to include even minute rules for regulating a particular trade or business, a contention not only frequently urged by counsel in argument, but found not to be without support in judicial dicta. (See *Citizens Ins. Co. v. Parsons*, 4 S. C. R. at pp. 294, 341; *Regina v. Lawrence*, 43 U. C. R. at p. 176.) but it has long since been authoritatively decided that read in connection with other portions of the Act those words must be held to refer to regulations relating to trade and commerce in their general and *quasi* national sense, and not to the contracts or conduct of particular trades.

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So in reference to the words to be found in section 91, "criminal law, including procedure"; read in connection with the powers granted to the Provincial Legislatures, I apprehend those words must be held to mean the general public criminal law as existing either by statute or at common law at the time of Confederation, or such matters as may by the Parliament of the Dominion be declared to be criminal, and would not include such penal offences as might in accordance with popular language be comprised under the phrase "criminal law," but which it is within the power of the Provincial Legislature to punish.

If this be so, it is not in this case, except with the view to accuracy of expression, of much importance to consider whether this is a civil or a criminal proceeding. If it is not criminal within the definition in section 91, the Local Legislature had full power to pass the Act, 52 Vic. c. 15 allowing an appeal to this Court.

If the argument that this is criminal proceeding be well founded, it follows that all the laws imposing penalties for violation of the Acts of the Local Legislature are waste paper; if the same Legislature which is empowered to inflict the penalties, cannot provide the machinery for enforcing them, then the justice of the peace who imposed

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the fines acted without authority, and all the proceedings from the commencement were *coram non judice*.

But it is almost elementary law that where power is given by statute to impose a penalty, it implies a power to enforce it: Dwarries, p. 23. As remarked by the late Mr. Justice Sanborn, any other view would give the Legislature of a Province less power than a municipality which such Legislature can create.

I cannot say that I entertain any doubt as to the power of the Local Legislature to pass the 52 Vic. ch. 15; the doubt I have is, as to the necessity of such an Act at all. The matters dealt with in the principal Act for the regulation of the cheese trade, like so many others to be found in Ontario legislation, have not the faintest possible connection with the criminal law. The penal clause is merely the sanction by which the provisions of the law are enforced. They are made offences punishable by summary conviction, but the Legislature, having the power to deal with the subject matter, has alone power to deal with the procedure affecting the penal laws which it enacts for its enforcement. This does not at all conflict with the decision arrived at by this Court in *Regina v. Eli*, 13 A.R. 526, where the offence was one created by an Act of the Parliament of Canada, and by it made a crime, and all the procedure connected with the infliction of punishment for this crime had necessarily to be fixed by the same Parliament, in which case, therefore, we were compelled to hold that the Court had no jurisdiction to entertain the appeal.

I am of opinion that the decision of the dissenting Judge in the Court below was correct, and that the judgment of the Divisional Court should be reversed.

OSLER, J. A.:—

The substantial question in this case is whether the Act under which the defendant was convicted is *intra vires* the Provincial Legislature as an Act relating to property and civil rights in the Province and for enforcing the same

by fine, penalty and imprisonment: British North America Act, section 92, clauses 13 and 15; or whether it is *ultra vires* that Legislature as an Act dealing with the criminal law and criminal procedure within section 91, clause 27.

Both of the learned judges who gave judgment in the Court below appeal to the test suggested by the Privy Council in *Russell v. The Queen*, 7 App. Cas. 839, 840; viz.: that it is by determining the true character and nature of the legislation in the particular instance that the class of subject to which it really belongs is to be ascertained, but as this merely states the difficulty which presents itself at the threshold of every case in which the question arises, it is not surprising that the learned Judges arrived at diametrically opposite conclusions, the Chief Justice being of opinion that the primary object of the Act was to create new offences and to provide for their punishment, while my brother Street considered that its real object was the regulation of the rights and dealings of cheese makers and their patrons. It may be noticed that there is another Act (not referred to in the argument or in the judgment below) on the provincial statute book on the subject with which this Act professes to deal, 31 Vic. ch. 33, passed in 1868, entitled "An Act to protect cheese and butter manufacturers." It appears by this title in the Revised Statutes of 1877, and again in the Revision of 1887, where, however, it is called "An Act to prevent fraud in the manufacture of cheese and butter."

It is difficult to understand why it was not repealed when the Act now in question was passed. Its existence simply provokes confusion and litigation.

The distinction between the two Acts is very nearly that which Street, J., relies upon as indicating the real character and object of the later one. The first makes it an offence generally, knowingly and fraudulently to deliver the deteriorated milk to the manufacturer. Under the other the offence seems to consist in delivering it to him without at the same time giving him notice in writing of its defect. What then is the real character and scope

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of the Act? Does it operate to enlarge the borders of the criminal law as that expression is used in section 91 (27); or is it concerned primarily with property and civil rights, providing for its enforcement by fine and imprisonment, as may lawfully be done where the principal matter is within one of the classes of subjects comprised in section 92? The competency of the enactment cannot be tested by the severity of the sanction so long as the latter is limited to fine, penalty or imprisonment; in other words, it cannot be argued that the thing prohibited is brought within the range of the criminal law merely by reason of the high nature of the punishment which may be inflicted upon the offender, and therefore those cases in which that has been made the test of an act being a crime, and the proceeding for its punishment a "criminal" as distinguished from a civil proceeding are of little or no assistance in construing this provision of the constitutional Act: *Attorney-General v. Radloff*, 10 Exch. 84; *Cattell v. Ireson*, E. B. & E. 91; *Legg v. Pardoe*, 9 C. B. N. S. 289; *Attorney-General v. Bradlaugh*, 14 Q. B. D. 667; *Mann v. Owen*, 9 B. & C. 595.

For the same reason, viz., that the sanction though appropriate to crimes, may be constitutionally attached to a provincial law, it is not necessarily a test of the act being a crime and of the law being *ultra vires* that it is pursued not at the instance of the injured party, but by the Crown or its representative.

Regard then is to be had to the prescribing rather than to the punitive clauses of the Act, and taking them by themselves as they appear in the Act, what fault can be found with them? The Legislature when really dealing with property and civil rights must have power to say "thou shalt" or "thou shalt not," and as the breach of the legislative command is always, in one sense, an offence, the line between what may and what may not be lawfully prescribed without trenching upon criminal law is sometimes difficult to ascertain and may shift according to circumstances. As has more than once been remarked, in one

way of dealing with a particular subject it may be within section 91, and in another way or for another purpose it may fall within section 92: *Citizens Ins. Co. v. Parsons*, 7 App. Cas. 107, 108; *Hodge v. The Queen*, 9 App. Cas. 130.

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The criminal law, so far as regards human legislation, in its ultimate object, even when dealing with public order, safety, or morals, is chiefly concerned with preventing and punishing the violation of personal rights and rights respecting property, and hence in a very wide sense with property and civil rights. But while in this sense and in making provisions applicable to the community at large, whether we speak of all the confederated provinces or of one, the right to legislate rests with Parliament, I do not see how the right can be denied to the Provincial Assemblies to legislate for the better protection of the rights of property by preventing fraud in relation to contracts or dealings in a particular business or trade, or upon other subjects coming within section 92, and to punish the infraction of the law in a suitable manner, so long, at all events, as Parliament has not occupied the precise field; for I suppose it will not be denied that the latter may draw into the domain of criminal law an act which has hitherto been punishable only under a provincial statute: *Hodge v The Queen*, 9 App. Cas. at p. 131. But if a particular species of fraud has not been converted into a crime by Dominion legislation I think that the Local Legislature must be at liberty to deal with it for the better protection of the class of persons immediately affected by it. The thing forbidden is not in such case converted into a crime merely because it happens to be also morally wrong and dishonest, more than any other thing which they may lawfully forbid becomes a crime merely because it is forbidden under a penalty.

Upon a careful examination of the Act in question I have, with sincere deference to the view expressed by the learned Chief Justice of the Queen's Bench, arrived at the conclusion that it is to be regarded as one, the primary object of which is not the creation of new offences gener-

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ally and the prevention of dishonesty among all classes in relation to the kind of dealings mentioned therein, but the regulation of the contracts and dealings between the parties in a particular business or transaction, and the protection of the manufacturer by enacting that certain things shall not be done unless the person dealing with him in that business gives him notice in writing respecting them. It is, I consider, designed more for the protection of civil rights than the promotion of public morals or the prevention of public wrongs. It is directly concerned with the property and civil rights and relations of a particular class of the community, and but for the punishment which the Act itself imposes for its breach, its sanction would have been found in that provision of the Dominion Act, R. S. C. ch. 173, sec. 25, which enacts that any violation of a provincial statute shall be deemed a misdemeanour and punishable accordingly. Or possibly, if the penalty had not been recoverable before justices on summary conviction the remedy would have been given in section 8, sub-section 31, R.S.O. (1887), ch. 1, the Interpretation Act. The provisions of the Adulteration Act appear to me to be hardly wide or precise enough to embrace what the Act in question aims at.

I agree, therefore, that the Act, though penal in its nature, is not a criminal enactment, and is therefore *intra vires* the Local Legislature.

The remaining question, which was pressed upon us so much as to make it proper to say something about it, relates to the procedure for enforcing the provisions of the Act. In the case *Regina v. Eli*, 13 A. R. 526, it was rightly held that no appeal lay from a summary conviction under the Canada Temperance Act. There we were dealing with criminal law and criminal procedure strictly, whereas here we have to do with proceedings under an Ontario Act, and if that be *intra vires*, it seems to follow as a matter of course that the Legislature which passed it must have power to enact the procedure by which it is to be enforced. It is axiomatic that the power to pass a law

must be accompanied with power to compel its observance. Judgment.
 As was said by the Privy Council in *Hodge v. The Queen*,
 9 App. Cas. 132, 133, in reference to the by-laws of the Police
 Commissioners: "If by-laws or resolutions are warranted,
 power to enforce them seems equally necessary and equally
 lawful." If there may be what in *Russell v. The Queen*, 7
 App. Cas. 840, was conveniently described as "provincial
 criminal law" there must of necessity be provincial criminal
 procedure. One is bound up with the other, since one legis-
 lature, supreme in its own domain, cannot be dependent
 upon another for the power to enforce its own laws. It
 may be said that the power to impose punishment for
 enforcing provincial laws has been expressly given by the
 constitution to the Local Legislatures. That no doubt was
 rendered necessary in consequence of the larger subject of
 criminal law and procedure having been relegated to Par-
 liament, but it affords no ground for the argument that
 the latter is to enact the criminal procedure in relation to
 provincial laws.

In this regard the following passages from Pomeroy's
 Constitutional Law, 8th ed., secs. 437, 438, as conversely
 applied to provincial legislation are extremely pertinent:

"In addition to the express powers bestowed upon Con-
 gress to define and punish crimes, there are a very large
 number of implied powers. These all exist from the very
 nature and necessity of the case. They are measures and
 means which are often absolutely necessary to the effec-
 tive exercise of the legislative function. A sanction is an
 essential element of every law. Without it all the imper-
 ative power of a law would be lost. A statute would
 cease to be a command and would become a mere request.
 Whenever Congress may adopt any particular measure
 in carrying out the specific grants of the constitution, it
 may declare acts of disobedience or acts which may tend
 to interrupt the accomplishment of the proposed design to
 be crimes and may affix such punishment as it deems
 proper. Without this capacity most of the national
 legislation would be a nullity. If it be said that

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the penal legislation necessary to enforce the laws of the United States might be left to the States, the answer is easy and conclusive. Every Government which is supreme must have the capacity to make its own commands obeyed. Just as far as it must look to other bodies, to other Governments, for help, it is subordinate. But the United States within its sphere is absolutely supreme, and it would be no more proper for it to appeal to the several States for penal legislation than for it to invoke the assistance of Great Britain or France. But in addition the States could not be compelled to legislate. Their action would be voluntary and the national Government would therefore be entirely at their mercy."

There are no decisions, that I am aware of, opposed to the view I have expressed. On the contrary, there are several which support it. These are *Regina v. Boardman*, 1 Cart. 676; *Pope v. Griffith*, 2 Cart. 291; *Ex parte Duncan*, 2 Cart. 297; *Page v. Griffith*, 2 Cart. 308; *Coté v. Chauveau*, 2 Cart. 311.

I also refer to 32 & 33 Vict. ch. 36 (D.) which repealed the old Summary Convictions Act of Canada, except as to matters within the control of the Provincial Legislature, and to the present Summary Convictions Act of Ontario, R. S. O. (1887), ch. 74.

It only remains briefly to notice the contention that the Dominion Act already referred to, R. S. C. ch. 173, sec. 25, for the Provincial Act, (the Interpretation Act) was not cited, in some way affected the right of appeal inasmuch as it declares that the wilful violation of a Provincial Act which is not made an offence of some other kind shall be a misdemeanour punishable as such, etc. It was urged that this made the offence for which defendant was convicted indictable and so brought it within criminal law and procedure. I think the answer is that the breach of the law is made an offence of another kind, viz., an offence punishable by summary conviction with defined penalties as a consequence. We may apply the language of Lord Esher in the well known case of *Attorney-General v.*

Bradlaugh, 14 Q. B. D. at p. 687: "Whenever an Act of Parliament imposes a new obligation and in the same Act imposes a consequence upon the non-fulfilment of that obligation, that is the only consequence. Therefore, it seems to me that the only consequence of voting as a member without having taken the oath in the manner appointed is that the member becomes liable to a penalty. If that be so, no indictment will lie." Comp. *Regina v. Buchanan*, 8 Q. B. 883; *Regina v. Sutcliffe*, 13 Q. B. 833, 837, 838.

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For these reasons I think the appeal must be allowed. I notice that the judgment is that of a Court or Division of the High Court and not of a single Judge. It may be worth while to consider on a future occasion whether the motion to quash a conviction under an Ontario Act ought not to be made, pursuant to the Judicature Act, section 61, to a single Judge, instead of to such Court or Division of the High Court, but as to this I express no opinion, referring to *Regina v. Fee*, 13 O. R. 590; *Regina v. McAuley*, 14 O. R. 643; *Regina v. Beemer*, 15 O. R. 266.

I therefore think that the appeal should be allowed, though without costs as the respondent abandoned all technical objections to the conviction, and the Act giving the appeal if, as decided in *Regina v. Eli*, 13 A. R. 526, an Act was necessary, was passed after the judgment appealed from and for the express purpose of bringing it before this Court.

MACLENNAN, J. A.:—

I also am of opinion that this appeal should be allowed.

The questions for decision are, first, whether it was competent to the Legislature to provide for the present appeal by the Act, 52 Vic. ch. 15, and secondly whether the Act, 51 Vic. ch. 32, under which the conviction was made, is constitutional.

It will be more convenient to consider the second question first.

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The Divisional Court held that the Act was invalid, because its primary object was to create new offences, and to punish them by fine and imprisonment, and so was a criminal law which could only be enacted by Parliament.

Mr. Justice Street dissented from the opinion of the majority of the Court, being of the opinion that the law was one in relation to "property and civil rights," and was within the competency of the Legislature.

The Act is entitled "An Act to provide against frauds in the supplying of milk to cheese or butter manufactories," and by section 1, forbids the knowingly and wilfully selling or supplying to a cheese or butter manufactory, or the owner or manager thereof, to be manufactured, milk diluted with water or from which cream has been taken, without notifying in writing the owner or manager that it has been diluted or has had cream taken from it."

Section 2 forbids a part of the milk known as "strip-pings" from being kept back without notice in writing.

Section 3 forbids tainted or partly sour milk from being supplied without notice in writing.

Section 4 imposes a penalty of from \$5 to \$50, and costs, with imprisonment up to six months with hard labour, upon conviction for any violation of the Act.

Section 5 requires the owner or custodian of cows under penalty to submit them to tests at the instance of the owner or manager of the factory to ascertain the quantity and quality of the milk.

Section 6 authorizes the owner or manager of a factory in case of suspicion, to enter the premises of the suspected person, with or without leave, and to take samples of the milk, and requires, under penalty, the suspected person to permit such samples to be taken.

Section 7 provides that certain specified evidence shall be *prima facie* sufficient to establish the guilt of any person under the first three sections of the Act.

The Legislature of Ontario in the first Session after it was constituted in 1868, by the Act 31 Vic. ch. 33, passed an Act somewhat similar in its provisions to the present,

entitled "An Act to protect cheese and butter manufacturers," and reciting that it was expedient and necessary to encourage and protect such manufactures.

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This enactment has remained without challenge or question, so far as I am aware, upon the Ontario Statute Book until the passing of the present Act, and is chapter 207, R. S. O. (1887).

The first occasion on which the subject was in any way dealt with by Parliament, appears to have been by the Adulteration Act of 1885, 48 & 49 Vic. ch. 67, sec. 15, by which the sale of watered or skimmed milk is prohibited, and this enactment is now R. S. C. ch. 107, sec. 15.

The learned Chief Justice of the Queen's Bench Division, who delivered the judgment of the Court in the Divisional Court, after quoting the above section 15 of the Adulteration Act, and also sections 22 and 23, which impose the penalties, remarks that these provisions of the Adulteration Act, would seem to include what is prohibited by section 1 of the Provincial Act; but with great respect that appears to me to be an error. What the Dominion Act prohibits, is only the selling or offering or exposing for sale of milk, &c., while the Provincial Act prohibits, not merely the selling, but the supplying, bringing, or sending of it to a manufactory, or to the owner or manager thereof to be manufactured. The Dominion Act is confined to cases of sale, and strikes at them alone, while the Provincial Act extends to the dealings in milk between the manufacturers and their customers, whether by sale or otherwise. We know that in general milk is not sold to the factories, but is supplied to them to be converted into butter or cheese, as the case may be, upon special bargains whereby the milk of all the customers is treated in one common mass, and returned to the customers in a manufactured state in agreed proportions, or afterwards sold by the manufacturer for the common benefit.

It is evident that in such transactions the utmost care as well as fairness and good faith are requisite on the part of all the customers in the supply of milk in order to prevent

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J.A. any one from gaining an undue advantage, and to secure to every one his proper proportion of the manufactured article and the provisions of the Act in question seem to have been designed to regulate the dealings between the manufacturers and their customers in such a way as to secure fairness and good faith, which the special circumstances of that business or trade seemed to the Legislature to call for.

When the several sections of the Act and its whole scope are considered, that seems to me with great deference to be the object and purpose of the Legislature, and not the creation of new offences, and their punishment by fine and imprisonment.

The Act in question seems to me to be very different from the Dominion Act. The latter is universal in its scope and application, and prohibits the forbidden acts by all persons whomsoever under all circumstances, and in all places throughout the Dominion, while the Provincial Act is confined to the dealings between these two particular kinds of manufacturers and their customers. The one has all the features of a public criminal law passed in the interest of the general public; the other is merely the regulation of the mode of carrying on a particular trade or business within the Province, so as to secure fair and honest dealing between the parties concerned.

In further comparing the provisions of the two Acts it is apparent that although by section 22 of the Adulteration Act the wilful adulteration of any article of food is prohibited, the skimming of milk is not declared to be adulteration, unless it is afterwards *sold* or offered for sale without request, and in vessels, and with measures, other than such as are prescribed by the Act. And I think it is clear that it does not prohibit skimmed milk from being supplied to a factory to be converted into cheese or butter, unless it is *sold* or *offered* to be sold to the manufacturer.

In my judgment, therefore, the law in question is not a criminal law, but a law in relation to "Property and civil rights in the Province," within the meaning of section 92,

sub-section 13, with the appropriate sanction to secure its observance authorized by sub-section 15.

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I think this case is governed by the judgment of the Privy Council in *The Citizens Ins. Co. v. Parsons*, 1 Cart. 265; and that it is a clearer case in favour of the validity of the Act than that was. In that case the Province assumed to regulate the contracts of a business so extensive and important that it was contended it necessarily came under the head of trade and commerce. Yet it was held to have the power to do so, and that the power extended not merely to companies incorporated by the Province, but also to companies incorporated by Parliament, and under the provisions of Imperial Statutes.

The Act there in question did not impose any penalties by fine or imprisonment to secure its enforcement, and therefore no argument was there made that it was void as a criminal law, but there can be no doubt, I think, that it was competent to have imposed penalties; and if it had, I am at a loss to see wherein it would have differed from the present law.

The proper way to look at this case, as it seems to me, is to lay out of view for the moment the penalty, and see whether the principal subject enacted is competent, because it cannot be open to contention for a moment that the imposition of a penalty for enforcing a law of the competence of the Legislature, is an interference with criminal law under section 91, sub-section 27.

If the principal matter of the enactment is competent, then the penalty may be added as of course: *Hodge v. The Queen*, 3 Cart. 144.

Looking at it in this way, what objection is there to this law? It is said that it creates an offence. But I think that is no answer. It enjoins or forbids something to be done. It imposes restrictions upon the sale, or bringing or supplying, of watered or skimmed milk. It requires written notice to be given that it is watered or skimmed. Just as the Insurance Act imposed restrictions and qualifications upon all contracts of insurance, so this

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J.A.

law imposes upon the customers of cheese and butter factories, in certain cases the obligation of giving a written notice as part of their contracts, whether of sale or otherwise.

In *Russell v. The Queen*, 2 Cart. 12, it is said that the true nature and character of the legislation in the particular instance under discussion must always be determined in order to ascertain the class of subject to which it really belongs; and it was said that Mr. Benjamin's argument that a provincial law with such penalties as were authorized by sub-section 15 of section 92, was a provincial criminal law, was well founded whenever the principal matter of the Act could be brought within any of the classes of subjects given exclusively to the Province.

I have endeavoured to shew that the true nature and character of this legislation is the regulation of a trade or business within the Province in the same sense exactly as the Insurance Act, and it follows in my opinion that so far as it may be regarded as a criminal law it must be excepted from section 91, sub-section 27.

When it is considered that by sub-section 15 of section 92, the Province has power to inflict penalty without limit in amount, and imprisonment without limit in duration, to enforce the observance of Provincial laws, it is impossible to say that the Province does not in a certain sense possess what may with propriety be called criminal jurisdiction, according to numerous definitions of criminal law to be found in the books. To hold otherwise is to disregard the well established meaning of words, and increases rather than diminishes the difficulties of interpreting the statute.

In *Paley on Convictions*, 6th ed., pp. 118, 119, it is said that where a statute orders, enjoins, or prohibits an act, every disobedience is punishable at common law by indictment; and in *Mann v. Owen*, 9 B. & C. at p. 602, Littledale, J., defined the word "crime" as being an offence for which the law awards punishment. See also a collection of decisions on the meaning of "criminal law" in *Regina v. Roddy*, 41 U. C. R. 291, and a collection of later cases in *Wilson's Judicature Act*, 7th ed., pp. 41, 42.

In the *Parsons Case*, (1 Cart. at p. 277) it was said: "The words 'regulation of trade and commerce' in their unlimited sense, are sufficiently wide, if uncontrolled by the context and other parts of the Act, to include every regulation of trade ranging from political arrangements in regard to trade with foreign governments, requiring the sanction of Parliament, down to minute rules for regulating particular trades. But a consideration of the Act shews that the words were not used in this unlimited sense."

Judgment.
MACLENNAN
J.A.

The same thing may be said of the words "criminal law," as used in sub-section 27. In their unlimited sense, these words include all Provincial laws for the violation of which punishment is awarded; and inasmuch as the Provinces have express power to award punishment, those words must receive a limited and restricted interpretation in the same way as "trade and commerce."

In *Hodge v. The Queen*, 3 Cart. at p. 160, the Lords of the Privy Council say that the principle which the *Russell Case* and the *Parsons Case* illustrate is, that subjects which in one aspect and for one purpose fall within section 92, may, in another aspect and for another purpose, fall within section 91; and so I think that what was here enacted, although it may, in its widest sense, be regarded as a criminal law, falls under section 92 as a legitimate dealing with property and civil rights in the Province.

For these reasons I am of opinion that the law in question is valid.

I am also of opinion that it was competent to the Legislature to give an appeal to this Court in cases of this kind.

I think the power of legislation over criminal procedure which belongs to Parliament is co-extensive with its power over criminal law, and that the same is true of the power of the Province. Any other rule would be productive of confusion and inconvenience, and, as was pointed out by Mr. Blake, would leave the Province at the mercy of Parliament, and helpless to make its legislation effectual.

The Courts of the Provinces have decided the matter in favour of the Provincial jurisdiction in several cases:

Judgment. *Regina v. Boardman*, 1 Cart. 676; *Regina v. Lawrence*, 1
MACLENNAN Cart. 742; *Pope v. Griffith*, 2 Cart. 291; *Ex parte Duncan*,
J.A. 2 Cart. 297; *Page v. Griffith*, 2 Cart. 308; *Coté v. Chauveau*, 2 Cart. 311; and *Cushing v. Dupuy*, 1 Cart. at p. 258, shews that procedure is necessarily involved in the jurisdiction over the subject.

It is also to be observed that section 3 of R. S. C. ch. 178, the Summary Convictions Act, seems expressly to confine the operations of that Act to offences over which Parliament has legislative authority; and section 106 seems distinctly to recognize the authority of the Province over procedure.

I am, therefore, clearly of opinion that we have power to hear the appeal.

Appeal allowed without costs.

BOLDRICK V. RYAN.

Bills of sale and chattel mortgages—Affidavit of bona fides—Description of chattels—Concurrent mortgages.

The affidavit of *bona fides* in a chattel mortgage taken to secure the mortgagee against his endorsement of two promissory notes, which were referred to in a recital, stated that the mortgage "was executed in good faith and for the express purpose of securing *me* the said mortgagee therein named, against *his* endorsement of a certain promissory notes for (*sic*) or any renewal of the said recited promissory notes."

Held, that "his endorsement" might be read "my endorsement," as this was clearly a clerical error, but that even with this correction, the clause remained vague and incomplete, and that the affidavit was therefore fatally defective.

Held, also, (HAGARTY, C. J. O., dissenting), that the mortgagee was entitled to fall back on a previous mortgage covering the same chattels, given to secure him against his endorsement of certain notes, of one of which one of the two notes referred to in the later mortgage was a renewal, there being evidence that when the later mortgage was taken it was not intended to abandon the earlier one.

McMartin v. McDougall, 10 U. C. R. 399, commented on.

Boulton v. Smith, 17 U.C.R. 400, in Appeal 18 U.C.R. 458, referred to.

Smale v. Burr, L. R. 8 C. P. 64; *Ramsden v. Lupton*, L. R. 9 Q. B. 17, distinguished.

What is a sufficient description of chattels and animals discussed.

Judgment of the County Court of Hastings varied.

THIS was an appeal from the the judgment of the Statement. County Court of the County of Hastings.

The defendants were execution creditors of one Baragar, and under their execution certain goods and chattels were seized which the plaintiff claimed as chattel mortgagee and an interpleader issue was directed.

It appeared that the plaintiff had endorsed for the accommodation of Baragar four promissory notes; one dated the 3rd of March, 1888, for \$400 payable 6 months from date, and three others dated the 1st of March, 1888, payable 12 months after date, for \$400, \$300 and \$200 respectively, with interest, and had taken to secure himself against his endorsement a chattel mortgage dated the 30th of January, 1889, containing among others the following provisions:

Whereas the said mortgagee has endorsed the several promissory notes, for the sum of \$1,300 of lawful money

Statement. of Canada, for the accommodation of the said mortgagor, which notes are in the words and figures following, that is to say: copies of said notes are hereto annexed and are for the following amounts, \$400, \$300, \$200, and \$400 with interest as therein stated.

And whereas the said mortgagor has agreed to enter into these presents for the purpose of indemnifying and saving harmless the said mortgagee of and from the payment of the said several notes, or any part thereof, or any renewal hereafter to be endorsed by the said mortgagee for the accommodation of the said mortgagor by way of renewal of the said recited notes, or any of them, so that, however, said renewal shall not extend the time of payment of said note or notes beyond the period of one year from the date hereof, nor increase the amount of said liability beyond the amount of said interest accruing thereon.

Now this indenture witnesseth that the said mortgagor * * * hath granted * * * unto the said mortgagee * * * all and singular the goods and chattels hereinafter particularly mentioned and described, that is to say: one Ironclad mower, one Patterson reaper, one Milwaukee self binder, one horse rake, three lumber waggons, one lumber sleigh, one cutter, one buggy, one pair shebogan sleighs, one seed-drill, two plows, one spring tooth harrow, one drag, one gang plow, one hair cloth rocking chair, one Dominion organ, one hair cloth sofa, one centre table, one couch, seven hair cloth chairs, ten cane bottom chairs, one sideboard, one bookcase, one brown horse named Frank, sixteen years old, one black horse named Prince, nine years old, one brown mare named Kate, ten years old, one brown mare named Mag, seventeen years old, one bay mare colt Jen, four years old, one mare colt named Kit, three years old, one cream colour horse called Tom, thirteen years old, one red bull four years old, one white cow eleven years old, one spotted white and red cow eleven years old, one spotted red and white cow twelve years old, two spotted red and white cows six years old, one spotted red and white cow five years old, three red

cows ten years old each, one red cow twelve years old, Statement.
one red cow twelve years old, two red cows each six years old, one brindle cow eleven years old, three red cows each five years old, one black cow seven years old, three red cows four years old, one red and white spotted cow four years old, three two-year-old heifers spotted red and white, one white two-year-old heifer, two clear white three-year-old heifers, two spotted red and white three-year-old heifers, together with the hay, grain and straw which may be produced and grown by the mortgagor upon the lands herein set out, viz., south-east part of lot 15, 1st concession of Rawdon, where mortgagor lives and works and farms, one wooden roller, one Patterson make mower, one covered two horse carriage, 200 cords of cordwood, 10,000 feet of basswood lumber now at mortgagor's mill in Sidney. * * *

Provided always, and these presents are upon this condition, that if the said mortgagor, * * * do and shall well and truly pay, or cause to be paid, the said notes and renewals, if any so as aforesaid endorsed by the said mortgagee, a copy of which said notes are set out in the recital of this indenture; and do and shall well and truly pay or cause to be paid all and every other note or notes which may hereafter be endorsed by the said mortgagee for the accommodation of the said mortgagor by way of renewal of the said notes or the renewals in the said recital to this indenture set forth, and indemnify and save harmless the said mortgagee, his heirs, executors and administrators, from all loss, costs, charges, damages, or expenses, in respect of the said notes or renewals, as hereinbefore set forth, so that the liability expires within a year from now.

Then these presents shall be utterly void to all intents and purposes.

Subsequently the three last notes with the interest due thereon were consolidated into a new note for \$1,000 dated the 12th of March, 1889, payable 12 months after date, which was substituted for them. The first note was re-

Statement. renewed by a renewal note for \$400 dated the 3rd of March, 1889, payable 6 months after date. The old notes were returned to the mortgagor, and on the 9th of April, 1889, a new chattel mortgage was taken by the plaintiff containing among others the following provisions :

Whereas the said mortgagee, at the request of the said mortgagor, and for his accommodation, hath endorsed certain promissory notes of the said mortgagor for the sum of \$1,400.00, upon the agreement that the mortgagor should execute and deliver these presents as security to the mortgagee, against his endorsement of said note or any renewal thereof that shall not extend the liability of the said mortgagee beyond one year from the date hereof, and against any loss that may be sustained by him by reason of such endorsement of said note or any renewal thereof, which said promissory notes are in the words and figures following :—

[The notes were then set out.]

[The chattels were the chattels covered by the previous mortgage and were described in the same way, with a further description by reference to their locality.]

The affidavit of *bona fides* was as follows :

I, James Boldrick, of Stirling, of the County of Hastings, merchant, make oath and say : That the above mortgage truly sets forth the agreement entered into between myself and George Baragar the said mortgagor therein named, and truly states the extent of the liability intended to be created by such agreement and covered by such mortgage, and that the same was executed in good faith, and for the express purpose of securing me the said mortgagee therein named, against his endorsement of a certain promissory notes for, or any renewal of the said recited promissory notes, and not for the purpose of securing the goods and chattels mentioned in the schedule hereto annexed, marked "A," against the creditors of the mortga-

gor, nor to prevent such creditors from recovering any Statement. claim which they may have against such mortgagor.

Upon the claim being made to the goods and chattels by the mortgagee an interpleader summons' was taken out by the Sheriff, and upon the return of this summons the claimant rested his claim on the mortgage of the 9th of April, 1889, and made no mention of the mortgage of the 30th of January, 1889. An issue was directed, and in this issue, the claimant being the plaintiff, his title was spoken of as being "by virtue of a chattel mortgage" but no particular mortgage was specified.

The issue came on for trial before LAZIER, Co. J., at Belleville, on the 10th of December, 1889, and at the trial both mortgages were proved and relied upon, apparently without any objection on the part of the defendant's counsel. There was some evidence that the new mortgage was not to be in substitution or satisfaction of the old mortgage. The learned Judge held that the mortgage of the 9th of April, 1889, was valid, and also expressed the opinion that even if the plaintiff was not entitled to hold the goods under the mortgage of the 9th of April, he could still hold them under the mortgage of the 30th of January, and he gave judgment in favour of the plaintiff.

From this judgment the defendant appealed, and the appeal came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER and MACLENNAN, JJ. A.) on the 5th of March, 1890.

T. Hislop, for the appellant. The affidavit of *bona fides* in the mortgage of the 9th of April, 1889, is defective. The words "his endorsement" are used instead of "my endorsement," and the whole affidavit is vague and uncertain: *Re Andrews*, 2 A. R. 24; *Davis v. Wickson*, 1 O. R. 369; *O'Donohoe v. Wilson*, 42 U. C. R. 329. Even if the affidavit is sufficient the description of the chattels is not full enough, there being no reference to locality, and the mortgage is invalid on that ground: *McCall v. Wolff*, 13 S. C. R.

Argument.

130 ; *Holt v. Carmichael*, 2 A. R. 639. The plaintiff cannot fall back on the first mortgage, as his claim was made under the second mortgage, and that mortgage was evidently taken in substitution for the first mortgage, which has come to an end. Even if the first mortgage can be relied on it does not assist the plaintiff, for in it also the description of the chattels is insufficient.

G. A. Skinner, for the respondent. The affidavit of *bona fides* in the second mortgage is quite sufficient, as, read with the recitals in the mortgage, it is quite clear what is intended to be covered and that is all that is necessary: *Embury v. West*, 15 A. R. 357 ; *Driscoll v. Green*, 8 A. R. 366 ; *Mathers v. Lynch*, 28 U. C. R. 354. The description of the chattels is also sufficient and the mortgage should be upheld. At any rate the plaintiff is entitled to rely on the first mortgage, the \$400 note mentioned in the second mortgage being a renewal of the note for the like amount mentioned in the first mortgage, and that first mortgage securing the mortgagee against any renewal notes becoming due within a year from the date of the mortgage.

Hislop in reply.

May 13th, 1890. OSLER, J. A.:—

The affidavit of *bona fides* in the mortgage of the 9th of April is defective in one essential particular, viz.: in the averment peculiar to the case of a mortgage given, as this was, to secure the mortgagee against payment of the amount of the liability which he had assumed for the mortgagor by the endorsement of the notes therein referred to. It is unfortunate that the 6th section of the Chattel Mortgage Act is so confusedly expressed, but it has been frequently pointed out that it provides for two classes of cases; one being that of a mortgage to secure repayment of advances made by the mortgagee under an agreement in writing with the mortgagor to make such advances; and the other the case of a mortgage of goods.

for securing the mortgagee against the endorsement of bills or notes or any other liability by him incurred for the mortgagor. In the former the affidavit of *bona fides*, besides the other particulars common to similar affidavits, must state that the mortgage sets forth truly the agreement and the extent of the liability to be incurred thereunder and was executed in good faith and for the express purpose of securing to the mortgagee repayment of his advances, while in the other, in addition to the common averments, the affidavit must state that the mortgage was executed for the express purpose of securing the mortgagee against payment of the amount of his liability for the mortgagor, such liability being in some way referred to or identified by the affidavit.

Judgment.

OSLER
J.A.

Now the chattel mortgage in question recites that the mortgagee at the request of the mortgagor hath endorsed certain promissory notes of the mortgagor for \$1,400 which are in the words and figures following, setting out two notes in full, one for \$1,000 and the other for \$400, upon the agreement that the mortgagor should execute and deliver the mortgage as security to the mortgagee against his endorsement of the said "note" or any renewal thereof, etc., and against any loss that might be sustained by him by reason of such endorsement of "said note."

The mortgagee's affidavit states that the mortgage truly sets forth "the agreement entered into between myself and George Baragar the mortgagor therein named,"—that being, not an agreement for future advances but an agreement to give the mortgage for the purpose described therein,— "and truly states the extent of the liability intended to be created by such agreement and covered by such mortgage;"—an averment which is only appropriate in the case of a mortgage to secure future advances under a written agreement to make them, but which in its present connection is confused and contradictory, for, while the liability intended to be created by the recited agreement can in terms only mean the mortgagor's liability to give the mortgage in pursuance of it the

Judgment. remainder of the sentence seems to allude to the liability
assumed by the mortgagee for the mortgagor, that being
what was intended to be secured by the mortgage. The
affidavit then proceeds "and that the same was executed
in good faith, and" (here we arrive at the averment peculiar and essential to the affidavit in a case of this kind)
"for the express purpose of securing *me* the said mortgagee therein named against *his* endorsement of a promissory notes *for* (*sic*) or any renewal of the said recited promissory notes," etc., etc.

Assuming that if there were no other mistake in this clause we might read "*my* endorsement" instead of "*his* endorsement," treating the latter as what it evidently is, a mere clerical error; (see *Hollingsworth v. White*, 10 W. R. 619), yet even making that correction the clause remains vague and incomplete, averring and identifying nothing certain in itself or made so by reference to anything else. Every reasonable intendment should be made in support of an instrument, the *bona fides* of which is not impeached, but we must be careful not to fritter away or nullify the statute in essentials. The cases of *Mason v. Thomas*, 23 U. C. R. 305, *Harding v. Knowlson*, 17 U. C. R. 564; and *Boulton v. Smith*, 17 U. C. R. 400, in Appeal, 18 U. C. R. 458, illustrate the strictness with which parties are held to what I may call a formula where the Act has given one. Less is required where the language of the Act is merely, as here, descriptive of the fact to be deposed to, but clearly the language of the deponent must be the equivalent of that of the Act.

This was decided in *O'Donohoe v. Wilson*, 42 U. C. R. 329, which was relied upon in the Court below and by the respondent. That case is, in my opinion, well decided, but there is no room for comparison between the language of the affidavits in the two cases. There the mortgagee stated "that I endorsed the promissory note in the said mortgage mentioned. That the said mortgage was executed in good faith and for the express purpose of securing payment of the said note and security and indemnity to me

against the said endorsement and any loss thereby." In this language, as HARRISON, C. J., says, we have all that the statute intended in words more numerous than necessary for the purposes of the statute.

Judgment.

OSLER
J.A.

As we are compelled for these reasons to hold the mortgage of the 9th of April invalid against the execution creditor the plaintiff falls back upon his earlier mortgage of the 30th of January, 1889, in the affidavit of *bona fides* of which no fault is to be found. This mortgage was proved and relied upon at the trial without objection, and the learned Judge has held that the plaintiff may recover under it. I am not therefore at this stage of the case disposed to consider very curiously whether it was open to him under the form of the issue to set up a title under both mortgages together or in the alternative, and no objection on this ground is taken in the reasons of appeal.

The mortgage of the 30th of April provides that it shall extend to renewals of the notes mentioned there which may be endorsed by the mortgagee, so long as the renewal does not extend the time of payment beyond a year from the date of the mortgage, and if the \$1,000 note had been made payable within the year from the 30th of January, 1889, instead of on the 12th of March, 1890, it would probably have been unnecessary to take a new mortgage as the renewal of the \$400 note falls due on the 3rd of September, 1889. The question then is whether, having accepted the mortgage of the 9th of April, which covers both notes, and having set up title and claimed under it, the mortgagee can also in the alternative rely upon his mortgage of the 30th of January so far as it is a security for the \$400 note, the renewal of which falls due within a year from its date.

There are several English cases which at the first blush appear opposed to the right of the mortgagee to rely on both mortgages and to lay it down that, by taking the second, the mortgagee cancels the first. It cannot be doubted that a second mortgage may be given to another mortgagee or to the first mortgagee for a different debt or

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to secure a different liability from that mentioned in the first mortgage, and that such second mortgage will be a perfectly valid security in the hands of the holder notwithstanding the fact that the absolute property in the goods appears to have been assigned by the first. See for example the recent case of *Usher v. Martin*, 24 Q. B. D. 272, and it is not easy to see why upon principle it should be otherwise in the case of a second mortgage to the same mortgagee even for the same debt or liability, especially where the latter assumes a different form, as for instance renewal notes.

It is, I think, always a question of intention, and if the second mortgage in a case like the present, had been expressed to be collateral to the first, it cannot be doubted that both would stand for what they were worth. The English cases I allude to are *Smale v. Burr*, L. R. 8 C. P. 64, and *Ramsden v. Lupton*, L. R. 9 Q. B. 17, and the cases cited therein. They arose out of that provision of the Bills of Sale Act which required that a bill of sale should be registered within 21 days after the execution, and otherwise should be void against execution creditors of the grantors. To avoid the disclosure of their affairs which would be caused by registration people dealing in bills of sale devised a method of evading the statute by taking a new bill just before it would have become necessary to register the first, and so on from time to time until in some cases the 15th or 16th of the series had been reached before the crisis came in the affairs of the grantor, necessitating the registration of the last bill, which was then set up against the execution creditor. The latter contended that the first was the only and real bill of sale, that the grantor had parted with all his title to the property by it, and so, that there was nothing upon which the subsequent bills could operate. The Courts held that the transaction having been entered into in good faith the case was not hit by the statute; that the consideration for the first bill supported the last, and as the last was *intended* to be the only and real bill and was necessarily the only one which

could be of any use or valid against creditors the inference was that it had been taken in substitution for the one immediately preceding it and the true legal construction *to be placed upon the facts* was that the giving of the subsequent bill had the effect of cancelling the former one in point of law. Other reasons for upholding the last bill were also suggested, such as that at all events the grantee had a title by estoppel under it against the grantor; that the execution of the subsequent bills of sale was but the exercise of the right of redemption, etc., etc. These decisions do not in my opinion govern the present case, which presents an entirely different aspect and in which the question is not whether the last bill is the only valid one but whether if it turns out to be invalid the grantee can resort to the first, or can rely upon both or either of them.

In those cases the grantee was out of court unless he satisfied the tribunal that the last bill had been taken in substitution of the former, and the course of dealing between the parties and the object they had in view shewed that it had been so taken. Here the grantee merely invokes the application of a legal principle and asks the Court to say whether in point of law, where nothing is said upon the subject, or where the contrary is expressly stipulated or intended, the result of taking a second security between the parties of the same kind, upon the same property, and for the same debt, is that the former is cancelled. I think that is not the legal result for the reasons I have already given. That a chattel mortgage is not extinguished by a second mortgage on the same property to secure the debt mentioned in the first, the following American cases shew, and based as they are upon principles derived from English authority, I think we may safely follow them: *Gregory v. Thomas*, 20 Wend. 17; *Hill v. Beebe*, 13 N. Y. 556. I may also refer to *Preston v. Perton*, Cro. Eliz. 817; *Burdett v. Clay*, 8 B. Monroe, 287; *Burnhisel v. Firman*, 22 Wall. 170; Herman on Chattel Mortgages, sec. 126, *et seq.* A different opinion seems to have been incidentally expressed in *McMartin v. Mc-*

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Dougall, 10 U. C. R. 399, though not necessary for the decision of the case. No authorities are cited, and I infer from what is said in *Hodgins v. Johnston*, 5 A. R. 449, that it would not have been followed; and in the case of *Boulton v. Smith*, 17 U. C. R. 400, and in Appeal, 18 U. C. R. 458, where, as here, the plaintiffs were the holders of two mortgages, the only reason apparently why, in this Court, they were held not entitled to rely upon the first was that they had not done so at the trial nor afterwards in term, but had abandoned it as untenable. Indeed Draper, C. J., expressly said in delivering judgment in appeal that the plaintiffs were not precluded from relying upon it in another action, subject to any technical objection arising from its not having been refiled.

I think then that the plaintiff may resort to the first mortgage, as the uncontradicted evidence is that it was not intended to be abandoned, and it must be assumed that the learned Judge has so found. As to so much of the property as is sufficiently described therein, it remains a valid security for the \$400 note and its renewal.

There is a difficulty about the description in the first mortgage, the property not being as a whole described with reference to locality. The following articles would seem, under the authority of *Holt v. Carmichael*, 2 A. R. 639, in this Court, to be insufficiently described, viz.: one horse rake three lumber waggons, one lumber sleigh, one cutter, one buggy, one pair shebogan sleighs, one seed drill, two plows, one spring-tooth harrow, one drag, one gang plow, one hair-cloth rocking chair, one hair-cloth sofa, one centre table, one couch, seven hair-cloth chairs, ten cane-bottom chairs, one sideboard, one bookcase, one wooden roller, one covered two-horse carriage, 200 cords of cordwood. It may, I think, be supported as to the remainder of the goods. In particular I think the description of the cattle is sufficient within the case of *Corneill v. Abell*, 31 C. P. 107, to which I was a party, and to which I adhere.

As to costs, the result being that the issue is found distributively, each party succeeds—each fails,—and therefore there should be no costs of the appeal.

MACLENNAN, J. A. :—

Judgment.

MACLENNAN
J.A.

Upon the whole I think the mortgage of the 9th of April, 1889, cannot be upheld.

I think the use of the possessive pronoun *his* instead of *my* in the affidavit of *bona fides*, although not strictly grammatical, introduces no obscurity or ambiguity into the meaning, and that coming after the words "the said mortgagee" is even grammatically defensible.

The other objection, however, is, I think, insuperable.

One of the matters which the statute requires the affidavit to contain is that the mortgage was executed "in good faith and for the express purpose of securing the mortgagee * * * against the payment of the amount of his liability for the mortgagor." Instead of these last words, the words used are "against his endorsement of a certain promissory notes for or any renewal of the said recited promissory notes."

I have struggled hard to come to the conclusion that the words here used satisfy the requirements of the statute, because the *bona fides* of the mortgage security is undisputed. But I have been unable to do so. The words "a certain promissory notes" to my mind are too vague and indefinite to enable me to say that they mean the notes which are the subject of the agreement mentioned in the earlier part of the affidavit. They might mean other notes, intended and understood between the parties. I do not think they do, but for anything that appears they might, and if so it is not the same thing as saying that the mortgage was made as security "against the payment of the amount of his (the deponent's) liability for the mortgagor," which is what the statute requires.

In *Harding v. Knowlson*, 17 U. C. R. 564, Sir John Robinson delivering the judgment of the Court said that under the first section of the Act equivalent words would not do, and that so to decide would be legislation, and that the statute is not directory.

In *Mason v. Thomas*, 23 U. C. R. 305, the Court held that

Judgment. the words "estate and effects" would do instead of "the
MACLENNAN goods," on the ground that they were more comprehensive
J.A. and better adapted to the case then before the Court, because the deed comprised real estate as well as goods.

We have not been referred to any case which in terms decides that equivalent words will do under the sixth section, but I think the rule laid down by Sir John Robinson in *Harding v. Knowlson*, 17 U. C. R. 564, has not been followed in all its rigidity in the later cases. But if it be sufficient to use equivalent words, I am unable to see that the words here used are equivalent to what the statute prescribes, and I am reluctantly forced to the conclusion that the affidavit is insufficient, and that the mortgage is invalid.

This makes it necessary to consider the earlier mortgage of the 30th of January, 1889, for this was relied on in the Court below and before us in the event of the mortgage of April being invalid, and was held to be good by the learned Judge.

In his affidavit in answer to the interpleader summons the plaintiff rested his claim on the mortgage of April and made no mention of the mortgage of January, and the issue delivered by his solicitor refers to his title as being "by virtue of a chattel mortgage," but not specifying any particular mortgage.

At the trial both mortgages were proved and relied upon, as I have already said, and apparently without any objection by the defendant's counsel, and they both comprise the same goods.

The old notes appear to have been given up to the mortgagor, but there is no evidence that the new mortgage was to be in substitution or satisfaction for the old. The mortgage itself is silent on that point, while in the mortgage of January there is a declaration that it "takes the place of another instrument between the parties entered into 5th March, 1888, and cancels that one."

In his evidence at the trial the plaintiff says :

"Q. You didn't cancel this mortgage when you took this last chattel mortgage ? A. No.

Q. You kept them both in fact, covering the endor- Judgment.
tion? A. Not a shadow of a doubt of it."

And this evidence is not contradicted.

MACLENNAN
J.A.

I have thus referred to the circumstances under which the new mortgage was given, because when a new mortgage is made between the same parties, of the same goods, and for the same debt or liability, it may be a fair inference of fact that the parties did not intend to keep both instruments on foot, and that the new one was taken in substitution for or in satisfaction of the old. But I think that inference may be rebutted. The parties may, if they think fit, keep the old one on foot as well as the new. There may be many good reasons why a prudent creditor should desire to retain the first security. By giving up the old mortgage he incurs the risk of incumbrances and other defects in his mortgagor's title which may have occurred since it was made. There may be other bills of sale or mortgages not yet five days old, and so not capable of being discovered, or there may be executions ready to be placed in the hands of the sheriff, and I think a creditor would be unwise, while his debt goes on continuously without interruption, to allow his security to slip out of his hands even for one instant. The statute requires mortgages to be renewed within 30 days before the expiration of a year from the filing, otherwise they become void as against creditors and subsequent purchasers, but the mode of renewal provided for will not do except within the period named, R. S. O. (1887) c. 125, sec. 11; Barron on Bills of Sale, p. 432. If the parties want to renew at an earlier period, for example, thirty-five or forty days before the expiration of the year, it can only be done by a new mortgage. I see no reason why this should not be done, and I cannot see any legal difficulty in the way, nor why the parties cannot agree that the old mortgage shall remain perfectly good and valid so far as its terms are not altered or varied by the new, until the end of the year. The folly of a mortgagee unnecessarily allowing the title to go back into the mortgagor is remarked upon by Jessel, M. R., in

Judgment. *General Finance Co. v. Liberator Co.*, 10 Ch. D. at p. 20. He
MACLENNAN J.A. says: "The defendants unluckily did what no prudent mortgagees should ever do, that is, they allowed the then owner of the legal estates to convey to Downs and then took a mortgage direct from him. As I have said, no mortgagee should ever allow the legal estate to get into his mortgagor's possession."

My learned brother OSLER has called my attention to several cases tending to shew that in such cases the legal result of the making of a new mortgage is to annul and extinguish the first. The cases are *Smale v. Burr*, L. R. 8 C. P. 64; *Ramsden v. Lupton*, L. R. 9 Q. B. 17, and *McMartin v. McDougall*, 10 U. C. R. 399. I do not, however, think that these cases decide the point adversely to the view which I have expressed. The question in the English cases was as to the validity of the new mortgage, and that was upheld, but the learned Judges differed in their reasons. As I understand the cases they decide no more than this, that when a new mortgage is given in substitution for a former one on the same goods the latter is good, notwithstanding the difficulty that the property in the goods was already in the mortgagee. It is true the inference was drawn in both those cases that the new mortgage was in substitution for the old, but I think that does not determine that such an inference can be drawn where it is proved not to have been the intention of the parties. I think the same observation may be made upon the case in our own Court of Queen's Bench of *McMartin v. McDougall*, 10 U. C. R. 399.

I think it is clearly not necessary in the case of a second mortgage of the same goods to suppose that the property in the goods goes back in some way to the mortgagor. There can be no doubt that a *cestui que trust* of chattels may borrow money from his trustee on the security of the trust goods and give him a good mortgage, though the legal property in the goods remains all the time in the mortgagee. So also a mortgagor may give any number of new mortgages of the same chattels to the same mortgagee

for a further advance, and all such mortgages will stand good, and I suppose no one ever doubted that the same goods may be lawfully mortgaged successively to different mortgagees. The statute itself recognizes the validity of subsequent mortgages of chattels made by the same mortgagor. All this shews that the fact that the legal property in the goods has passed out of the mortgagor by the first mortgage makes no difficulty in the way of subsequent mortgages. The validity of all such instruments rests on the fact that the mortgagor is still the owner of the goods though the legal property is out of him and in the first mortgagee, and the essence of a mortgage is now nothing more or less in the eye of every Court than an appropriation by the mortgagor of his interest in the goods, whatever it may be, whether legal or equitable, to the mortgagee by way of security. It can make no difference that the legal property is already in the mortgagee under some previous transaction. If it is, it is already where the parties intend and desire it to be, and nothing further is required to be done or imagined in order to place it there. Every mortgage consists of two parts, the conveyance of the property, and the defeasance which shews it to be a security, and specifies the terms and conditions of redemption. If the title or property is already in the mortgagee, the conveying part of the instrument is unnecessary, and its place might be taken by a recital of the fact, and the instrument would be equally as effectual as if it purported to transfer what had been transferred already.

The decisions referred to were all before the Judicature Act, and were in Courts of Common Law, and I think the objections which were raised in these cases would not now be listened to.

I am therefore of opinion that the first mortgage was not satisfied or discharged or extinguished by the second, contrary to the intention of the parties, and that the plaintiff may rely upon it, if it be otherwise good, notwithstanding the taking of the second.

Judgment.

[MACLENNAN
J. A.]

Two objections were taken to the validity of the first mortgage, one that three of the notes were renewed for 12 months from the 12th of March, 1889, a period which would be beyond one year from the date of the mortgage, the 30th of January, 1889, and the other that there was no sufficient description of the goods to satisfy the requirements of the statute. On the first point there is no doubt at all of the fact that the renewal of three of the notes carried the liability of the endorser beyond the year, but it is equally clear that the fourth note, namely one for \$400, it is immaterial which of the two for that amount, was renewed for only six months. There is therefore a part of the liability intended to be secured by the first mortgage which still comes within its terms and for which the plaintiff was entitled to hold it at the time of the seizure. I do not think it can be contended that the renewal of part beyond the year affected the validity of the mortgage as regards the other part which did not extend beyond it.

As regards the other point, I think the authorities oblige us to hold that the description of some of the articles is insufficient, while that of others is good enough. There is no locality mentioned except with respect to the hay, grain and straw to be produced and grown on the mortgagor's farm, as to which being goods not *in esse* at the time of the mortgage, no registration was necessary. I think *Holt v. Carmichael* in this Court, 2 A. R. 639, obliges us to hold that the description of all the farming implements and household furniture is insufficient, while on the authority of *Corneill v. Abell*, 31 C. P. 107, I think the description of the live animals is good.

No objection to the description appears to have been taken at the trial, and I have had some doubt whether effect ought to be given to such an objection taken for the first time in appeal. As to some of the articles it is conceivable that if the objection had been taken at the trial some evidence might have been given to overcome the objection, though it may be difficult to see what such evi-

dence could be; as to others, however, it is plain that nothing whatever could be done to help the description, for example, one cutter, one buggy, two plows, one drag, one centre table, one couch, one sideboard, one book case, and that it is and always was incurable. The plaintiff therefore cannot in any way be prejudiced by the objection not having been urged at the trial as to these. Nor did he suggest before us that if the objection had been taken at the trial he could have cured the defect of description as to any of the goods. I think therefore we can do no injustice in giving effect to the objection at this stage as to all the goods except the live animals and that the prejudice the plaintiff has suffered from the objection not being taken earlier can be compensated by the disposition we make of the costs. We think there should be no costs of the appeal and that the plaintiff should have the costs of the trial and of and incidental to the interpleader proceedings.

Judgment.
MACLENNAN
J. A.

BURTON, J. A., concurred.

HAGARTY, C. J. O.:—

I think that so long as the interpleader order remained unchanged the learned Judge should not have received evidence of any mortgage except that under which the plaintiff made his claim. It is strange that the counsel for the execution creditor made no objection to the earlier mortgage being received in evidence.

It seems to me to be most unfair to an execution creditor who determines to contest the claim on a chattel mortgage to spring another security upon him at the trial. He is advised that the mortgage on which the plaintiff claims the goods is defective for non-compliance with the statute, and he therefore risks the heavy costs of a trial.

It was, I consider, the duty of the claimant to state the whole of his claims so as to give fair notice to his opponent. If he had made any mistake in such statement he

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HAGARTY
C. J. O.

should have applied for leave to amend it, and a defendant possibly would abandon his claim if advised that the amended order would be fatal to his success.

However, both documents are now before the Court. I agree with my learned brothers in the result they have arrived at if the earlier mortgage be properly admissible.

But I am of opinion that the taking of the April mortgage should have been held to be a discharge or rather an abandonment or satisfaction of this preceding January mortgage. A conveyance of the same goods and chattels as the property of the vendor with warranty of title on its face, I think, presumes an existing right to convey property thus vested in the purchaser—a conveyance, of course, could be made of the vendor's equity of redemption, but that is not pretended here. The debt is changed, and notes given in a different form in the last from the first mortgage.

I attach no weight to the plaintiff's assertion at the trial that he relies on both instruments. Such is the natural assertion when his counsel is offering both in evidence. I see no reason for, but much against, our not accepting the view expressed in *McMartin v. McDougall*, 10 U. C. R. 399, and I am unable to see the force of the distinction drawn by my brother OSLER between a case like the present and the English authorities cited by him.

Lord Coleridge in *Ramsden v. Lupton*, L. R. 9 Q. B. 17, quotes approvingly the language of Bovill, C. J., in *Smale v. Burr*, L. R. 8 C. P. 64, "as between assignor and assignee, at least, the effect of giving each bill of sale was to annul and cancel the bill of sale that stood earlier in the series."

This, I think, is the legal effect in a case like the present, and it was held to be in England.

I do not question the right of parties dealing in such securities to provide in the later a provision aptly expressed that the earlier instrument was still to be held existent.

Appeal allowed in part, and, HAGARTY, C. J. O., dissenting, dismissed in part.

PECKHAM V. DEPOTTY.

Contract—Master and servant—Parent and child.

The plaintiff, while a child of very tender years, had been placed by her father with the defendant, who was not a relation, to remain with him until she attained eighteen years of age, he agreeing to support her during that time, to send her to school, to supply her with clothing, and to give to her certain articles when she reached the age of eighteen. She remained with the defendant until she was nearly twenty years of age, being in all respects treated as a member of the family, and doing such work as a member of the family would naturally do.

Held, that the plaintiff had no implied right to remuneration for services rendered after she attained the age of eighteen, and that in the absence of any express agreement for payment of wages, she could not recover. Judgment of the County Court of Elgin reversed.

THIS was an appeal by the defendant from the judgment Statement. of the County Court of the County of Elgin.

The plaintiff, when a child of about four years of age, was placed by her father with the defendant, a farmer; the terms of the arrangement being set out in the following document:—

THIS AGREEMENT, made this tenth day of October, in the year of our Lord eighteen hundred and seventy-two, between George Peckham, labourer, of the township of Gainsborough, in the County of Lincoln, Province of Ontario, of the first part, and James Depotty, yeoman, of the same place, of the second part, witnesseth that the said party of the first part doth release all claim and control of Sarah Peckham, daughter of the party of the first part to the party of the second part, until she, the said Sarah Peckham, attains the age of eighteen years.

The condition of this agreement is such that the party of the second part binds and obliges himself to school the said Sarah Peckham according to law, also to keep the said Sarah Peckham in good clothing. At the expiration of said time the party of the second part binds and obliges himself to give the said Sarah Peckham the following property, namely: one cow, six sheep, one bed and bedding, one set of chairs, and one set of dishes.

In witness whereof the parties have set their hands and seals in the presence of	}	Sd. C. H. PECKHAM. (Seal.)
	}	Sd. JAMES DEPOTTY. (Seal.)
Sd. SAMUEL G. WIGGINS.		

The plaintiff remained with the defendant until she attained the age of eighteen years, being treated in all respects as a member of the family, and taking part in the work of the farm in the usual manner. After she attained

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the age of eighteen years she had some dispute with the defendant and his wife and expressed her intention of going away, but offered to remain if wages were paid to her. The defendant and his wife, however, stated that she was free to leave when she wished, and refused to pay any wages, and the plaintiff subsequently stayed on with the defendant for nearly two years, giving her services and being treated in the same manner as formerly. She then left the farm and brought this action against the defendant to recover wages for her services after she attained the age of eighteen years.

The action was tried before HUGHES, Co. J., and a jury at St. Thomas, on the 12th of December, 1889, when a verdict was returned in favour of the plaintiff for \$126.75, being 81 weeks' wages at \$1.75 a week, less \$15 for some clothes given to her.

Upon motion in term the learned County Judge refused to set aside the verdict for the plaintiff, but reduced it to \$106.50.

The defendant appealed, and the appeal came on to be heard before this Court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ. A.) on the 5th of March, 1890.

Aylesworth, for the appellant. The plaintiff is clearly not entitled to any wages under the circumstances of this case. She was living with the defendant as a member of his family and was treated by him in all respects as a member of his family, and the case must be regarded as if she actually were a member of the family. It is clear that looking at the case in this way there would be no implied right to remuneration for such services, and it cannot be contended that there was any express agreement to pay wages, so that the plaintiff cannot recover: *Morris v. Hoyle*, 28 C. P. 598; *Reeve v. Reeve*, 1 F. & F. 280; *Foord v. Morley*, 1 F. & F. 496; *Redmond v. Redmond*, 27 U. C. R. 220; *Smith on Master and Servant*, 4th ed., p. 197.

J. S. Robertson, for the respondent. The plaintiff cannot be looked upon as being in the same position as if she were

actually a member of the defendant's family, as under the Argument. agreement she was to obtain certain remuneration for her services up to the age of eighteen years, and the reasonable inference is that when she remained with the defendant after she attained the age of eighteen years and rendered him services, she should be paid therefor. At all events there was evidence to go to the jury upon the question of whether there was an agreement to pay the wages or not, and the jury having found in favour of the plaintiff, their verdict should not be disturbed: *Commissioner for Railways v. Brown*, 13 App. Cas. 133.

Aylesworth, in reply.

May 13th, 1890. BURTON, J. A.:—

With great respect I think the proper course for the learned Judge to have pursued was to have withdrawn the case from the jury on the ground that there was no evidence from which any contract to pay could be implied.

It was upon this principle that, even so far back as Lord Mansfield's time, an action by a slave, brought into England by his master, to recover wages from the period when he became free, was held not to be maintainable.

Here it is admitted that there was no agreement to pay wages and that upon her leaving she offered to return and remain if they would pay her wages, which was refused.

It was incumbent upon the plaintiff, before she could recover, to shew that there was an agreement that she should be remunerated for her services. No contract to that effect can be implied from the fact of her remaining over and working as before, and it was for the Judge, under the circumstances, to hold that there was nothing from which a jury could infer such a contract.

The fact that there was no actual relationship between the parties does not appear to me to be an element in the case. The defendant was, in fact, *in loco parentis*. The plaintiff was, during these many years, treated as a member of the family, and was not to receive wages, but merely

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board, lodging, and clothing, like one of the family, with a similar outfit to what she would have received as an actual member of the family upon leaving, and seems to have always written to the defendant's wife as mother.

The fact that under the special contract made with her father, there was to be something given her on the expiration of the contract, cannot be relied on as any evidence that if she remained longer she was to be paid, and it would, to my mind, be most unreasonable that it should be so. The presumption would be that she was still continuing in the former relationship as a member of the family. Why should the defendant, without any intimation to him of any change in the relationship previously existing, be forced into a contract to pay wages, whilst he might be still willing to maintain the plaintiff as a member of his family, but nothing more? But here it is sworn to, and not contradicted, but rather affirmed by the plaintiff, that the plaintiff was told that her things—that is, the outfit—was ready for her whenever she wanted to leave, and she replied she was not going till she got married.

The case resembles very much in its circumstances that of *Reeve v. Reeve*, 1 F. & F. 280, where there was some slight evidence of a bargain after the expiry of the time during which the plaintiff was to serve for board, lodging and clothing, that he should receive wages.

Baron Martin, of course, upon the evidence in that case, had to submit the case to the jury, but his language was very clear as to the nature of the evidence required to support the action.

He said: "The question is whether there was a bargain for wages; because if work is done and there is no bargain for payment, either express or to be implied from such circumstances as *show an understanding on both sides* that payment shall be made, an action cannot be maintained for remuneration merely because it may appear to be reasonable." There was a verdict for the plaintiff, but it was set aside in term.

Foord v. Morley, in the same volume, at p. 496, is a case

which could not only not be withdrawn from the jury, but was one in which a verdict for the plaintiff might well have been upheld on the ground that in the absence of any evidence that she was to receive board and lodging and the trifling benefit of being permitted to keep poultry in lieu of wages, they might well have inferred that her services were to be remunerated. But she had resided with the defendant as his housekeeper for some 8 or 9 years without ever being paid any wages; had once left the defendant's employment without being paid anything, and returned again to his employment; and the jury upon being told that—as nothing had been *said* about wages—it was for the plaintiff to establish that there was an understanding, arrangement, or contract, that she should be paid for her services.

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BURTON
J.A.

The case referred to by the plaintiff's counsel in 13 App. Cas. 133, does not assist him. No doubt, if there was evidence on both sides properly submitted to the jury, the verdict of the jury once found ought to stand, and the setting it aside should be of rare and exceptional occurrence. Here the evidence was entirely one way, and it was admitted by the plaintiff herself that there never was an understanding or agreement that she should work for wages after she became eighteen. Up to that period she had been treated as a member of the family, and as there was no original contract for wages, no action will lie without evidence of a promise by the defendant to pay for her services.

I cannot say that I entertain the slightest doubt that there was no case for a jury, and the appeal ought to be allowed.

OSLER, J. A.:—

The question is whether there was any evidence to go to the jury that the plaintiff was serving for wages after she arrived at the age of eighteen.

I was at first inclined to think that the case could not

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have been withdrawn from them, but on further consideration and examining the evidence more closely, I have arrived at a different opinion.

In *Roberts v. Smith*, 4 H. & N. 315, Martin, B., said: "It is by no means a matter of law that a person shall be paid for his services; it is a matter of contract. No doubt there is a variety of labour from which there arises an irresistible inference that the person who has done it is to be paid, but that is a sort of labour which is always done for money, and in such cases a jury would presume a contract on the ordinary terms, unless evidence was given to the contrary." And in the case of *Foord v. Morley*, 1 F. & F. 496, the same learned Judge is reported as saying much the same thing in his charge to the jury: "The plaintiff must establish that there was an understanding, arrangement, or contract that she should be paid for her services." This, of course, is not to be understood as affirming that proof of an express contract is necessary. And no doubt the general rule is that stated by Channell, B., in *Browning v. Great Central Mining Co.*, 5 H. & N. 856: that where services have been rendered it ought to be clearly shewn that those services were not to be remunerated. The presumption may be rebutted by circumstances, as in the well known class of cases of which there are so many examples in our reports, of actions brought by one relative for services rendered to another while living with the latter as a member of his household.

Upon the same principle, as is pointed out in Smith's Master and Servant, 4th ed., p. 197, Lord Mansfield said he always non-suited the plaintiff in actions brought by persons who had been slaves, and who had continued in their master's employment after coming to England: *Rex v. Thames Ditton*, 4 Doug. 300.

In such cases as these the facts appeared in the plaintiff's evidence and there was nothing to go to the jury—no proof of an express contract, and the circumstances not admitting an implied one.

In the case before us there was no express contract be-

tween the parties. What the plaintiff received or was entitled to on arriving at the age of eighteen depended upon the bargain made with the defendant by her father when she was placed as an infant under his control, and it is difficult to say that this was to be given on the footing of a reward for services rendered. After she attained eighteen, no express agreement was made, and we must therefore look for evidence from which one may be implied. If the plaintiff is to recover anything, very little would suffice, and if there had been on the defendant's part merely a desire expressed to the plaintiff that she would remain with him, and services rendered by her thereafter, it would have been enough to warrant a verdict *quantum meruit* even though nothing whatever had been said about wages. Nothing was in fact said about wages, and the difficulty in the plaintiff's way is, that she begins by proving that her home had always been with defendant from infancy ; that he was *in loco parentis* towards her, and that she had been brought up by him and his wife as one of the family and therefore did not in the first instance go there as a servant, though she was by the agreement made with her father, to receive a sort of outfit or portion at eighteen. She might have gone away on arriving at that age, or before it, and *qua* servant she could have claimed nothing. Instead of doing so she remained in his house without any apparent change in their relations until her father came to take her away. Then, according to her own statement, which agrees with the evidence of the defendant and his wife,—she told them that she “ would stay if they would use her better and pay her wages.” Taken in connection with the fact that nothing had previously been said about her staying for wages, the only inference that can justly be drawn from this is, that she had not been working for wages from the time she arrived at eighteen until her father came for her. Her statement entirely fits in and is consistent with the uncontradicted evidence of the defendant and his wife, that they were willing she should go at the expiration of the time

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for which they had taken her, and told her that her things were ready for her at any time, but that she said she was not going away until she got married. This, if the plaintiff had then in her mind the intention of claiming wages, was directly to mislead and deceive the defendants.

It appears to me on the whole that there was no evidence proper to be submitted to the jury of any implied contract to pay wages or remuneration for services, and that the plaintiff stayed with the defendant for no other reason than that she regarded his house as her home, and that he and his wife permitted her to do so without any intention on either side that she should be paid for services rendered by her.

I think, therefore, the learned Judge should have entered a non-suit either at the conclusion of the plaintiff's case, or directed a verdict for the defendant when the whole of the evidence was in, and that, the case having been sent to the jury, the verdict entered for the plaintiff should be set aside and verdict now directed for the defendant.

I may add a reference to *Reeve v. Reeve*, 1 F. & F. 280, and *Otis v. Hall*, 117 N. Y. 131.

HAGARTY, C. J. O., and MACLENNAN, J. A., concurred.

Appeal allowed with costs.

CUMBERLAND V. KEARNS.

Covenants for title—Local improvement rates.

The defendant joined in a petition to a municipal council to pass a by-law to open a street through the property of the defendant and others under the local improvement clauses of the Municipal Act. The petition was adopted and a by-law passed under which the work petitioned for was done. Subsequently the defendant sold his land to the plaintiffs and conveyed it to them by deed made in pursuance of the Act respecting Short Forms of Conveyances, containing the statutory covenants for title. A rate to pay for the improvements, payable in ten annual instalments, but subject to commutation, was imposed afterwards upon the land benefited, including that sold by the defendant.

Held, affirming the judgment of the Chancery Division, 18 O. R. 151, that the rate was an encumbrance created in part by the action of the defendant, and that the plaintiffs were entitled to recover damages under the covenants for quiet enjoyment and against encumbrances, the amount recoverable being the smallest amount necessary to discharge the encumbrance.

THIS was an appeal from the judgment of the Chancery Statement Division, reported 18 O. R. 151.

The defendant and others were the owners of a large block of land in the western part of the city of Toronto, between Bloor street and Dundas street, and wished to run a street through this block of land so that they might be able to sell off the property in building lots. For two or three years attempts were made by the owners to induce the Council to take the matter up as a local improvement, and finally in February, 1885, a petition was presented to the Council, signed by the defendant and the other owners of the property to be benefited, praying that the street might be opened and the work constructed as a local improvement, the cost to be paid by special rate assessed upon the property pursuant to the provisions of the Municipal Act. The defendant was active in promoting the petition and in obtaining signatures thereto.

On the 24th of February, 1885, the Committee of Works reported to the Council that the petition had been signed by the requisite number of property owners interested, representing one-half in value of the property benefited, and they recommended that the prayer of the owners should

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be granted and that a by-law should be passed to give effect to it.

The matter was referred to the Engineer, who on the 21st of April, 1885, reported that the cost of opening the street, including compensation for land and structures on the line of the proposed street and all necessary grading and fencing, would be approximately \$8,200, and would be assessed equally on the property on the line of the street in proportion to the frontage, the whole being equally benefited by the proposed improvement.

This was passed on by the Works Committee to the Council on the same day. On the 27th of April, 1885, the Engineer reported to the Council the description of the property which would be specially benefited by the proposed work, and he included the parcel in question in this action.

Proceedings were then taken in the usual manner before the Court of Revision, and the Engineer's report was confirmed by that Court on the 24th of June, 1885.

On the 9th of July, 1885, the Council passed a by-law in which it was recited that it was desirable and necessary, for the convenience of the owners of the property mentioned in the Engineer's report, to establish and open up a public road or highway at the expense of the property benefited, and it was enacted that the street in question should be and thereby was established, and that the parcel of land specially described therefor in the by-law should be and thereby was taken and appropriated for and established and confirmed as a public street, to be known as Margueretta Street.

On the 23rd of September, 1885, a by-law was passed appointing an arbitrator on behalf of the Council to determine the amount of the compensation to be paid to the owners of the lands expropriated.

On the 16th of October, 1885, the defendant and other property owners signed a memorandum stating that they were ready and willing "to dedicate and give so much of our properties as form part of the said street, being strips of the said properties measuring 33 feet on each side

of the proposed street by the length of our frontage, and to take and receive therefor at the rate of \$2.50 a foot for each foot of said strip." Statement.

This memorandum was adopted by the Council as settling the amount to be paid to the several owners as compensation for the property expropriated for the street and no arbitration was had. A report of the Committee of Works (not dated but prior to the 10th of November, 1885,) containing a statement shewing the names of the several owners, their frontages and the amount they were to receive "according to their agreement of the 16th of October, 1885," and recommending that the Treasurer should be instructed to provide funds to pay the amounts, was subsequently passed.

The statement in this report shewed that instead of the cost of the whole work being \$8,200 as estimated, the cost of the land alone would be \$19,126.33, and the latter sum was on the 10th of November, 1885, directed to be provided by the Treasurer as an "interim appropriation."

The work was then proceeded with, and after it was done a by-law was passed, on the 29th of August, 1887, entitled "By-law to provide for borrowing money by the issue of debentures secured by local special rates on the property fronting or abutting on Margueretta Street." This by-law contained a recital of the petition already referred to and a recital that the street had been opened and that the whole cost was \$21,921.24, of which the City was to bear \$452.28, and it enacted that a rate of \$44 and 6 13/100 mills per foot frontage should be imposed on the real property described and benefited (the land in question being included in the description), for the term of ten years, in order to raise the amount annually required to meet the debentures thereby authorized to be issued for the work.

The defendant had in the meantime sold the land in question to the plaintiffs, and had conveyed it to them by deed bearing date the 14th of April, 1887. This deed was made in pursuance of the Act Respecting Short Forms of

Statement. Conveyances, with the usual statutory covenants, among others, the covenants for quiet enjoyment and against encumbrances, which in the long form are as follows :

“And that it shall be lawful for the said covenantee, his heirs, executors, administrators and assigns, from time to time and at all times hereafter, peaceably and quietly to enter upon, have, hold, occupy, possess and enjoy the said land and premises hereby conveyed, or intended so to be, with their and every of their appurtenances; and to have, receive and take the rents, issues and profits thereof, and of every part thereof, to and for his and their use and benefit, without any let, suit, trouble, denial, eviction, interruption, claim or demand whatsoever of, from or by him the said covenantor, or his heirs, or any person claiming, or to claim, by, from, under or in trust for him, them or any of them.

And that free and clear, and freely and absolutely acquitted, exonerated and for ever discharged, or otherwise by the said covenantor or his heirs well and sufficiently saved, kept harmless and indemnified of, from and against any and every former and other gift, grant, bargain, sale, jointure, dower, use, trust, entail, will, statute, recognizance, judgment, execution, extent, rent, annuity, forfeiture, re-entry, and any and every other estate, title, charge, trouble and encumbrance whatsoever, made, executed, occasioned or suffered by the said covenantor or his heirs, or by any person claiming or to claim, by, from, under or in trust for him, them or any of them.

And the said covenantor, for himself, his heirs, executors and administrators, doth hereby covenant, promise and agree, with and to the said covenantee, his heirs, executors, administrators and assigns, that he hath not at any time heretofore made, done, committed, executed, or wilfully or knowingly suffered any act, deed, matter or thing whatsoever, whereby or by means whereof the said lands and premises hereby conveyed, or intended so to be, or any part or parcel thereof are, is, or shall or may be in anywise impeached, charged, affected or encumbered in title, estate or otherwise howsoever.”

At the date of this deed the street had already been ^{Statement.} constructed.

Subsequently the plaintiffs were compelled to pay one of the yearly assessments and brought this action against the defendant under the covenants in the deed.

The action was tried before ROBERTSON, J., who gave judgment in favour of the plaintiffs and this judgment was affirmed by the Divisional Court of the Chancery Division.

The defendant appealed and the appeal came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 7th of March, 1890.

J. Haverson, for the appellant. The assessment in question has not been imposed upon the land by means of any act of the defendant, so that there has been no breach of his covenants. Under the Municipal Act there are two ways of having local improvements effected. The city may initiate proceedings for an improvement and unless a certain number of ratepayers affected petition against the proposed improvement, the city may carry it out. On the other hand, a certain proportion of the ratepayers affected may petition the city to carry out an improvement and the city may then pass upon the petition and decide to carry the work out. This is what was done in the present case, but in each case the decision rests with the city, and it is not bound to go on merely because a petition is presented by a sufficient number of ratepayers. Merely signing a petition has no effect. It is clear that if the city had initiated proceedings the defendant would not be liable nor would he be liable if he had refused to sign a petition to the city by his co-owners. Admitting this, how is it possible to say that by merely signing a petition upon which the city came to a decision and decided to take certain proceedings he has made himself liable? There is no more liability than if the defendant had by agitating the matter got the city to take it up and

Argument. initiate proceedings. *Moore v. Hynes*, 22 U. C. R. 107, is really a case in favour of the defendant. In that case the plaintiff was claiming payment of arrears and also of a sum sufficient to commute the future payments, but it was held that even assuming that the rates were charged on the land still they were charged only so far as they had fallen into arrear, and there was no charge so far as the future payments were concerned. It must be remembered also that in that case the covenants were unlimited, while here they are limited. This is nothing but a tax, the arrears of which only form an encumbrance: *St. Sulpice v. Montreal*, 16 S. C. R. 399. The plaintiffs had notice of the charge and were aware of the usage of the city, and knew that these rates would be paid year by year, and cannot now complain. The lands in question being specifically charged with a rate for these local improvements are relieved from a proportion of the general taxes, and if the plaintiffs succeed in this action they really get the land free from taxes for several years to come.

J. H. Ferguson for the respondents. In *Moore v. Hynes*, 22 U. C. R. 107, the covenant related to arrears only. It was not therefore necessary for a decision of that case to consider whether future payments would be a charge or not. The work in question has been done at the request of the defendant and the other property owners, and without that request the council had no power to take the proceedings, so that each person signing the petition did an act enabling this charge to be imposed. The assessments became a charge on the land as soon as the by-law was passed and that was before the deed: R. S. O. (1887) ch. 184, sec. 623. The transaction is simply equivalent to the property owners borrowing from the city sufficient money to enable the proposed improvement to be made, and the city taking back from them a mortgage on their properties to secure repayment of the loan. Mere concurrence in an act of others is a breach of the covenants: *Hobson v. Middleton*, 6 B. & C. 303; *Anderson v. Oppenheimer*, 5 Q. B. D. 602; *Butler v. Swinnerton*, Cro. Jac.

656; Dart, Vendors and Purchasers, p. 884. The plaintiffs *Argument.* had no notice that the assessment was unpaid. They do not object to the rate for the block pavement or sewer, but they were entitled to assume when buying the land that the road-bed was paid for.

J. Haverson, in reply.

May 13th, 1890. OSLER, J. A. :—

The question is whether a tax or assessment imposed by the city council for a work done as a local improvement on the petition of the defendant and others is an encumbrance upon the land within the meaning of the defendant's covenants for quiet enjoyment, free from encumbrances, and that he has done no act to encumber, in his conveyance of part of such lands to the plaintiffs. The case is in some respects novel, but when the facts are properly understood I think the principle is plain.

The defendant and others being owners of a block of land in the northern part of the city between Bloor street and Dundas street, and being desirous to improve it otherwise than at their own expense, for the purpose of selling it to the best advantage, determined to run a street through it 66 feet in width, to be called Margueretta street, on each side of which lots of a convenient size could be laid out. Naturally it was undesirable that the width of the street should be lost by the wasteful process of dedication, and turning to the Municipal Act the owners discovered a method there provided by which, if they could only induce the council to adopt it, the city would not only advance to them the value of the land required for the street, but would also assume the duty, and pay in the first instance the cost, of laying out and constructing it, taking back in effect a mortgage for the whole outlay in the shape of a charge to be created by the special assessment—a charge which would not be felt by the owners in consequence of the increased value given to the rest of the property by means of the improvement, and which would be borne by

Judgment.

OSLER

J.A.

the purchasers of the lots unless protected by the covenants of the vendors.

[The learned judge stated the facts in detail, as above set out, and continued:]

Upon this state of facts it appears to me clear that the defendant's covenants are broken.

That the assessment was a charge upon the land needs no argument. The statute makes it so.

The proceedings were taken under section 612 of the Municipal Act, relating to local improvements.

Under the provisions of that section, local improvements, including the opening of a new street, may be either originated by the council and carried out by them at their own instance subject to the control which the ratepayers may exercise under sub-section 4 (*a*), or may be undertaken at the instance of the property owners who may set them in motion by presenting a petition, as in the present case, for the work or improvement they desire, signed by at least two-thirds in number, representing one-half in value, of the owners of the property to be benefited. What the council may do upon receipt of such a petition is "to make the necessary assessment, pass the necessary by-laws and take all proper and necessary proceedings for the execution of such work, improvement or service, with as little delay as possible."

This was accordingly done by the council upon the defendant's petition, but it is nevertheless strongly contended that it was not the act of the defendant within the meaning of his covenant, but was the independent legislative act of the council just as much as if they had themselves initiated the proceeding, because they had a discretion and were not bound to accede to the petition or to act upon it at all. In one sense, no doubt, it was the act of the council, but the question is whether that act was not brought about and occasioned by and at the instance of the defendant and his associates. To that question the evidence admits, in my opinion, of but one answer. The word *acts* means something done by the

person against whose acts the covenant is made, and the word *means* has a similar meaning, something proceeding from the person covenanting: *Spencer v. Marriott*, 1 B. & C. 457; *Dennett v. Atherton*, L. R. 7 Q. B. 316; *Carpenter v. Parker*, 3 C. B. N. S. 206.

Judgment.

OSLER
J.A

The defendant was an actively consenting party to what was done, and the council in making the improvement and imposing the assessment derived their power to do so from, and acted at, his instance and that of his fellow petitioners. The defendant was active in promoting the petition and he caused it, when signed by a sufficient number, to be presented to the council for the express purpose of inducing them to make the improvement petitioned for and to charge the cost of it by a special assessment upon his land and that of the other signatories. It is true that the council might have rejected it, but they did not reject it. On the contrary they adopted it and acted upon it as all their subsequent proceedings shew. The defendant meant and intended that they should act upon it, and their doing so was the probable and direct consequence of his act in promoting it and urging it upon them. In cases of this kind, where the council proceed upon a petition, they are, in a sense, the agents of the property owners in making the improvements and imposing the assessment. I think the Court below were right in saying that the plaintiff and his friends set the council in motion and that the tax was imposed by his instrumentality and procurement. Through his act and by his request the council imposed the tax and *occasioned* the encumbrance. And through an act done by him by inducing them to make the improvement and impose a tax for it the premises sold to the plaintiffs were encumbered. As he himself puts it, the city *lent* him and the others the price of the expropriated land and advanced money in paying for the improvements and assessed it back upon the frontages, and this was done at their request. That is the pith of the matter, and I think it comes within the defendant's covenants. Suppose the defendant had procured a burden or

Judgment.

OSLER
J.A.

encumbrance to be imposed upon the land by means of a private Act, I see not but that upon the principles applicable to such acts they would come within the qualified covenants: Maxwell, p. 363, Wilberforce, pp. 220, 222; *King v. Toms*, 1 Dougl. at p. 406. I have noticed one case in which the point was raised but it did not become necessary to decide it: *Blatchford v. Plymouth*, 3 Bing. N. C. 691.

The final by-law distributing the assessment upon the several properties was not passed until after the conveyance to the plaintiffs, but that was only the necessary act for the completion of the proceedings which had been already taken at the defendant's instance. The observations of Brett, L. J., in *Anderson v. Oppenheimer*, 5 Q. B. D. 602, are very much in point. Distinguishing that case from others cited he says: (p. 607.) "In the cases which have been cited to us, an authority to do an act had been given by the lessor before the granting of the lease, and afterwards an act had been done pursuant to that authority; that is to say an act had been committed by some person authorized by the prior authority of the lessor to do it, which had diminished the tenant's enjoyment of the premises demised to him. In these cases, although the authority had been given before the lease, the act had been done after it; it was, therefore, an act for which the lessor was responsible, he having conferred the authority to do it, and the act was done during the enjoyment by the lessee." Here the city had acquired a paramount right to complete the proceedings begun and taken at the instance of and for the defendant, and the last by-law is as much attributable to his action as the first.

No argument was addressed to us on the subject of the damages, and I have no doubt the Court below rightly held that the amount recoverable was the smallest amount necessary to discharge the encumbrance, viz.: the amount at which the assessment might be commuted under the by-law.

I need hardly say that when the council initiate the proceedings *sua sponte* the tax imposed is not in any

sense an encumbrance attributable to the act of vendor. Judgment.
 So also where a general by-law has been passed directing all improvements to be made on the local improvement system under section 625. OSLER
J.A.

I think the appeal should be dismissed.

MACLENNAN, J. A.:—

I have had some doubt in this case but have come to the same conclusion as my learned brothers, that the appeal should be dismissed. The covenant is that the defendant had done nothing whereby the lands were or should or might be in any wise encumbered, and what the defendant had done was that he had requested the corporation of the city of Toronto to open Margueretta street and to take steps to charge the lands in question and other lands with the expense of opening and grading the same. When the deed was made the corporation had so far complied with the request that they had opened the street. They had incurred the expense but they had not actually imposed the charge by passing the necessary by-law for the purpose.

My doubt was, that inasmuch as it was entirely optional with the city corporation to comply or not to comply with the defendant's request, the encumbrance which it afterwards imposed as a deliberative and not an obligatory act, could hardly be regarded as the consequence, within the meaning of the covenant, of the defendant's request.

It is however a general rule that every person is answerable for what is done at his request, though the person requested be under no obligation to do the act, as for example a request to commit a trespass or an assault or to make an arrest. And so I think that the encumbrance in question having been imposed at the request of the defendant, that request must be regarded as an act done by him, within the meaning of the covenant.

HAGARTY, C. J. O., and BURTON, J. A., concurred.

Appeal dismissed with costs.

THE ELECTRIC DESPATCH COMPANY OF TORONTO V. THE
BELL TELEPHONE COMPANY OF CANADA.

Contract—Telephone Company—Covenant not to transmit orders.

Statement. This was an appeal by the plaintiffs from the judgment of the Chancery Division, reported 17 O. R. 495, and came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A.) on the 11th and 12th of March 1890.

Robinson, Q. C., and Moss, Q. C., for the appellants.
Lash, Q. C., and S. G. Wood, for the respondents.

Judgment. May 13th, 1890. The Court being divided in opinion the appeal was dismissed with costs.

Per HAGARTY, C. J. O., and BURTON, J. A. The covenant in question was broken, subscribers being enabled by the active intervention of the defendants to give orders of the kind referred to to persons other than the plaintiffs.

Per OSLER, and MACLENNAN, JJ. A. The covenant was not broken, the defendants taking no active part in the transmission of the messages, but merely allowing subscribers to communicate with one another in the usual manner.

LEMAY V. CANADIAN PACIFIC RAILWAY COMPANY.

*Railways—Master and servant—Negligence—“Any person injured”—51
Vic. ch. 29, sec. 289, (D.), and as such is entitled to recover damages
if injured by the negligence of his employers in omitting to comply
with the provisions of section 232, by packing frogs as therein directed.
Judgment of the Chancery Division, 18 O. R. 314, affirmed,*

A servant of a railway company is a “person” within the meaning of 51 Vic. ch. 29, sec. 289, (D.), and as such is entitled to recover damages if injured by the negligence of his employers in omitting to comply with the provisions of section 232, by packing frogs as therein directed. Judgment of the Chancery Division, 18 O. R. 314, affirmed,

THIS was an appeal by the defendants from the judgment of the Chancery Division, reported 18 O. R. 314.

The plaintiff, while employed as a switchman by the defendants, had, on the 20th of October, 1888, his left foot caught in an unpacked frog, and was run over, his foot being so badly injured that amputation was necessary. The action was brought to recover damages, and was tried before FALCONBRIDGE, J., and a jury, at Port Arthur, at the Summer Assizes of 1889.

The following were the questions submitted to the jury and their answers thereto.

1. Did the plaintiff, before the happening of the accident, have notice or knowledge, or ought he to have had notice or knowledge, that the frog was not packed? A. We believe he did not have notice, and should have had notice.

2. Did the accident happen to the plaintiff by reason of the frog not being packed in accordance with the statute? A. We believe that it did.

3. Did the plaintiff receive the injuries while engaged in the discharge of his duties as a servant of the defendants, and in consequence of the discharge by him of such duties? A. We believe he received the injuries in the discharge of his duties, and in consequence of them.

4. Was the plaintiff guilty of contributory negligence? A. We do not believe that he was.

5. If the plaintiff should be held entitled to damages, at what sum do you fix them? A. Twenty-five hundred dollars.

Upon these findings judgment was entered for the plain-

Statement. tiff with costs, and this judgment was affirmed by the Divisional Court.

The defendants appealed, and the appeal came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A.) on the 13th of March, 1890.

Robinson, Q. C., and *G. F. Shepley*, for the appellants. The provisions of R. S. O. (1887), ch. 212, and R. S. O. (1887), ch. 141, do not apply to this action; the former because the defendants are not within the jurisdiction of the Province of Ontario, and the latter because no notice has been given as required by that Act. The case turns upon the construction of sections 262 and 289 of the Dominion Railway Act, 51 Vic. ch. 29. The appellants contend that under section 289 servants of the company have no new right of action against the company; that is, that servants are not included in the words "any person," but that as to them the common law doctrine still applies, and that as in this case the accident happened owing to the negligence of a fellow-servant the plaintiff cannot recover.

The general right of action given by the section in question must be construed with reference to the acts prohibited, or the omissions referred to, in the previous sections, and among these previous prohibitions and requirements are many which are applicable only to the protection of the public. If Parliament had intended to effect a radical change in the common law affecting the relations between master and servant, it would have adopted apt legislation for that purpose. It is not to be presumed that Parliament intended to abrogate the common law, nor is it necessary, in order to give a reasonable and full effect to the section in question, that it should be considered as so doing, when this provision may very reasonably be interpreted as relating to the rights of the public in the preceding sections referred to.

In the United States, statutes of this kind have

been construed as not applying between master and servant: *Randall v. Baltimore & Ohio R. W. Co.*, 109 U. S. 478; *Carle v. Bangor, etc., R. W. Co.*, 43 Me. 269; *Rohback v. Pacific R. W. Co.*, 43 Mo. 187; *Proctor v. Hannibal, etc., R. W. Co.*, 64 Mo. 112; *Sullivan v. Mississippi, etc., R. W. Co.*, 11 Iowa 421; Thompson on Negligence, pp. 1004, 1005; 2 Harvard L. Rev. p. 212.

There being no decisions on the question in our own Courts, the American authorities ought to be followed.

Assuming, however, that the section in question does apply to servants, it merely, at most, removes out of the servant's way the defence that the master might otherwise have raised, that the omission to pack the frogs was one of the risks of the employment. To the master are still left all other defences which he might have set up at common law. To enable the servant to succeed, therefore, it must be shewn that he was himself ignorant of the defect, and that the master was aware of it. Here the jury have found that the plaintiff ought to have known of the defect in question, and this is fatal to the right of recovery: *Griffiths v. The London and St. Katharine Docks Co.*, 12 Q. B. D. 493, 13 Q. B. D. 259; *Clegg v. Grand Trunk R. W. Co.*, 10 O. R. 708; Thompson on Negligence, p. 995. *Thomas v. Quartermaine*, 18 Q. B. D. 685, and that class of cases, do not apply, they being decided under special legislation, doing away with the common law doctrine. See Patterson on Railway Accident Law, pp. 160, 382.

Delamere, Q. C., for the respondent. The only reasonable construction of this section is, that it gives to any person, whether a servant or not, a statutory right of action for negligence of the company. It is not a question of negligence by a fellow servant. The company could not delegate their responsibility to a subordinate, and if they chose to leave to a subordinate the duty of complying with the terms of the statute, and that subordinate did not comply with these requirements, the company are not in any way relieved. The requirement as to packing frogs cannot apply to the public alone, if indeed

Argument.

it applies to them at all. Such a requirement can only be intended for the protection of persons who have occasion to cross the tracks of the railway company, and the only persons who have the right to do this are the servants of the railway company, the public, if they attempt to do this, being trespassers. Many of the other provisions of the statute apply clearly to servants of the company though the word "person" is used. The American cases do not, when carefully considered, go further than to preserve to the master the right to say that the negligence complained of is not his but that of a servant, and to enable him to raise the defence that the negligence being that of the fellow servant, the servant complaining cannot recover, but in this case and under our statute, the defence that the negligence complained of is that of a fellow servant cannot be raised. The duty is the duty of the master, and the negligence is also therefore the negligence of the master. Even admitting that there was negligence on the part of the fellow servant, still there was also negligence on the part of the master, and in that case, the servant injured could, even at common law, bring his action. The answer of the jury that the plaintiff should have had notice that the frog was not packed, means that the defendants should have informed him of that fact, and not that he himself should have been aware of it. This is plain from reading the Judge's charge, and from reading the other answers of the jury, for they find against contributory negligence, and therefore necessarily against knowledge on the part of the plaintiff.

Robinson, Q. C., in reply.

May 13th, 1890. HAGARTY, C. J. O :—

I do not think that any question of importance requires extended notice on this appeal except the very serious point as to whether the remedy given by the statute applies to railway servants. As to the meaning of the answer of the jury to the question whether the plaintiff

had notice or knowledge, or ought to have had notice or knowledge that the frog was not packed, I agree with the learned Chancellor.

Judgment.

HAGARTY
C.J.O.

Looking at the Judge's charge it would seem that the jury were being directed to the enquiry whether the plaintiff personally knew or ought to have known that it was not packed. But I cannot see any rational ground for interfering from any possible misunderstanding on this. I do not think the jury meant to impute any want of care in not seeing that this defect existed. The omission either to ask or not to answer such a question, would not, I conceive, warrant an interference with the verdict, looking at the other findings of the jury.

On the main point. It must certainly be a matter of very great regret if the law requires us to hold that certain statutable requirements for the safety apparently of all persons, must be held to have excluded from their operation the class almost exclusively affected by their non-observance.

The appellants argue that the section in question only applies to persons *not* railway servants. Neither railway passengers nor the general public can be regarded as likely to suffer from non-packing of a frog.

The general public in fact are by the same statute (section 273) forbidden to trespass on the track under a penalty.

We find in the same Act (section 192) provisions for ensuring a headway of at least seven feet between the top of the highest freight car and any bridge under which the road passes.

It is difficult to see what persons outside the class of railway servants are intended to be protected. Neither passengers nor the general public would be likely to be found on the tops of freight cars.

It may be inferred from some language of the late Chief Justice Cameron in *McLauchlin v. Millland R. W. Co.*, 12 O. R. 418, that he leaned against the right of a servant to recover, but he and his brethren decided the case

Judgment.

HAGARTY
C.J.O.

on other grounds and under the statute law as it then existed, prior to the Act of 1888.

Section 262 provides for the packing of frogs. It has a sub-section, (5), enacting that "the oil cups or other appliances used for oiling the valves of every locomotive in use upon any railway shall be such that no employee shall be required to go outside the cab of the locomotive, while the same is in motion, for the purpose of oiling such valves."

Now, this enactment specially provides for the safety of the servants—to no other class could its direction be applicable.

I suppose the defendants' counsel would urge the *expressio unius* doctrine here. I do not think it would apply, as it was necessary to name the persons who could possibly be affected.

Then section 289 declares that every company causing or permitting anything to be done contrary to the provisions of the Act, or omitting to do any matters, etc., required to be done, etc., is liable to any person injured thereby for the full amount of damages sustained by such act or omission.

The main contention of defendants is, that Parliament cannot be held, by implication, as intending to alter the common law as to one servant being barred from recovering against his employer for injuries received through the negligence of a fellow servant.

Even if we adopt this general argument we may find it difficult to apply it to the facts of this case.

The company is directed to have the frogs packed.

The frog in question had never been packed.

There was a lumber siding constructed in August, two months before the accident, and there was a frog in it.

William Fraser, a section foreman, proved that he put the frog in; that it never was packed. He said he "was taken from one work to another, and was too busy laying temporary tracks down and taking them up all over." We thus see that the company presented this piece of new work for use in the first instance without having it in the state required by law for the protection of anybody.

This appears to me a default on their part, removed from all difficulties arising from the common employment doctrine. They offer a road for use in the beginning without the statutory safeguards. This appears to be emphatically their own default, just as if they commence running trains over a road before the bridges are fully completed or safe.

Judgment.

HAGARTY
C.J.O.

When the plaintiff, their servant, is required in his duties to work in this new section, I think it is not the neglect or default of a fellow servant that should be regarded, but the positive default of the employers, the company, in presenting or opening that section for use before it was legally fit for use. I look upon the duty of seeing that a track is fit for use and properly safeguarded as required by law before its being used, as a duty which the company must perform at its peril, and that it will not excuse them to prove that they gave directions to have everything done rightly and legally. It might present a different aspect if the portion of road had been all right at its opening—the frog duly packed—and that by some servant's neglect it had not been re-packed. The original omission to pack the frog cannot, as I think, be properly excusable as the negligent act of a servant in a common employment with plaintiff.

I think the appeal should be dismissed.

BURTON, J. A. :—

There is, no doubt, some ambiguity in the answer to the first question submitted to the jury, but if the defendants wished to have availed themselves of that as an answer in their favour they should, I think, before the jury left the box, have obtained a more explicit reply, and it cannot now, read in connection with the answer to the fourth question, be treated otherwise than establishing that on the whole facts the plaintiff was not guilty of any such contributory negligence as disentitles him to recover.

Upon the main contention that the words “any per-

Judgment.

BURTON
J.A.

son" do not include the very persons for whose protection the section of the statute was presumably passed, I should require very cogent authority for adopting such a construction.

The case referred to in the United States Supreme Court, *Randall v. Baltimore & Ohio R. W. Co.* 109 U. S. 478, though not binding upon us, would be entitled to our gravest consideration, and if it had decided this point expressly, I must confess, speaking for myself, that I should hesitate a good deal before setting up my own opinion against the unanimous decision of that tribunal; but I feel it is no authority for the contention for which it was cited.

That case decides, (and my dissenting judgment in a case decided some years ago in this Court, *Rosenberger v. The Grand Trunk R. W. Co.*, 8 A. R. 482, will show that I fully agree in that decision), that the provisions of the statute which require the railway company to blow the whistle or ring the bell when approaching a highway, which it crosses, apply only to persons travelling upon the highway so intersected upon the same level, and meeting with injury by actual collision, and not to persons passing over a bridge above the railway or upon the highway at a distance from the intersection, to whom the railway company owes no duty.

It is authority that the words "any person," are not always to receive a literal construction, but should be considered in connection with the entire statute, and that, if when literally construed they would lead to a conflict between different portions of the Act, or to absurd conclusions, they may be restricted or enlarged in their operation so as to cause each part of it to harmonize with every other part.

To the same effect is the decision of the Court of Appeal of the State of New York in *Harty v. Central Railway of New Jersey*, 43 N. Y. (3 Hand) 468; and of the Supreme Court of Rhode Island, in *O'Donnell v. Providence, etc. R. W. Co.*, 6 R. I. 216, and is a canon of construction well understood in England and our own country.

In accordance with this rule of construction, I should have held that a servant did not fall within the words, "any person," in a case arising under that section for omitting to ring the bell on approaching a highway; but applying the same rule of construction, I should have come to the conclusion that this section in reference to the packing of frogs, was intended primarily for the protection of the very class of which this plaintiff is one.

Judgment.

BURTON
J.A.

Whether, although the action is given by the statute, it would be open to the company to raise the question of common employment, does not arise in this case, and it is unnecessary therefore to express any opinion.

The neglect of duty in this case was that of the principal not of a fellow servant, and I think no case has been made out for our interference with the judgment which the plaintiff has in his favour.

OSLER, J. A. :—

I admit the force of the argument against giving the extended meaning to the words "any person," as used in section 259 of the Railway Act, where the statute gives a right of action to "any person" injured by the act or omission of the company. I agree that it is not to be construed in derogation of the common law rule as to the non-liability of the master for an injury sustained by one servant through the negligence of a fellow servant, unless in the case of the particular act or omission provided against such extended construction is plainly required.

That principle, I think, is very clearly laid down in several of the cases cited: *Carle v. Bangor, etc. R. W. Co.*, 43 Me. 269; *Sullivan v. Mississippi, etc. R. W. Co.*, 11 Iowa 421; *Proctor v. Hannibal, etc. R. W. Co.*, 64 Mo. 112; *Randall v. Baltimore & Ohio R. W. Co.*, 109 U. S. 478. In the last case it was held that a statute containing a provision similar to that in our Railway Act for sounding the whistle or ringing the bell of the engine of a train approaching a highway crossing was

Judgment.

OSLER
J.A.

intended for the protection of travellers on the highway, as this Court held in *Rosenberger v. Grand Trunk R. W. Co.*, 8 A. R. 482 ;—affirmed by the unanimous judgment of the Supreme Court, 9 S. C. R. 311—and that a clause enacting that the railway company should be liable “to any person injured” for all damages sustained by reason of such neglect, did not make the company liable for an injury caused by the negligence of the fireman in this respect, to a fellow servant who had been struck and injured by an engine moving in the railroad yard where he was working.

I refer also to Endlich on Statutes, secs. 127, 128 ; *The Warkworth*, 9 P. D. 20, and *Kraemer v. Gless*, 10 C. P. 470.

In the case at bar, the plaintiff was a switchman in the defendants’ employment, and the injury complained of was sustained in consequence of the omission to pack the railway frog between the fixed rails of a switch, as required by section 262 of the Act. I am clearly of opinion that in such a case the plaintiff, though a fellow servant of the person in the employment of the company, through whose negligence the omission to pack the frog occurred, is a “person injured” within the meaning of section 289, and can maintain an action therefor against the company.

I think we are entitled to say that it is a matter of common knowledge that the persons who usually sustain injury through the omission to pack the frog, are the switchmen and brakemen whose duties in coupling and uncoupling and shunting cars, involve their constant presence on the track at this dangerous place ; and therefore that the provisions of sub-sections 2, 3, and 4 of section 262, were introduced and intended by the legislature, so far as frogs are concerned, directly for their protection ; and we find them associated with another provision, (sub-section 5), in the same section, for the safety of “employees,” relating to oil cups for oiling the valves of a locomotive. An additional argument in favour of this view, is to be drawn from section 273, which expressly forbids every one not connected with the railway or employed by the company to walk along the track thereof, except where the same

is laid across or along a highway, and it is improbable to say the least of it, that the legislature would enact that frogs should be packed in favour of trespassers.

Judgment.

OSLER
J.A.

An extended construction is, I think, therefore plainly required to be given to the words "any person" in section 289, which will embrace a servant of the company sustaining injury in consequence of an omission to comply with the provisions of section 262; in other words, I think that the latter section was introduced for the benefit of such persons, and therefore that the plaintiff is not hampered by any of the usual restrictions attaching to litigation between master and servant, such as the servant's ignorance and the master's knowledge of the defect.

The object of requiring frogs to be packed evidently was for the protection of a class and not of the public, who, unless they infringe the express prohibition of section 273, incur no danger from the unpacked frog. Were we to yield to the defendants' contention, we should practically reduce the section in this respect to a nullity, and therefore in order to give full effect to its provisions, we must read the words in their plain comprehensive sense and hold that the common law doctrine, or the doctrine established by *Priestly v. Fowler*, 3 M. & W. 1, is superseded by them.

In this view, I cannot see that the ambiguity in the answer of the jury to the first question is of much importance. The parties should have had it removed at the trial when the jury came in, but assuming in the defendants' favour that they meant to say that the plaintiff ought to have taken notice, or to have known of the defect in the sense of imputing default on his part; yet such a finding is not inconsistent with the absence of contributory negligence, from which by another finding they expressly absolve him. For these reasons I am of opinion that the judgment below is right, and that the appeal should be dismissed.

Judgment. MACLENNAN, J. A. :—

MACLENNAN
J. A.

I am of the same opinion.

We were very much pressed with the argument that the statute must be so construed as to except from its remedial effect, all cases of injury arising from the negligence of a fellow servant, on the ground that the legislature could not be supposed, without express words, to have intended to alter the rule of the common law. And the rule, said by Endlich on Statutes, p. 174, now to have assumed the form of dogma in the United States, that all statutes in derogation of the common law, or out of the course of the common law, are to be strictly construed, was invoked. A number of decisions in the Courts of the United States, were also cited in support of that doctrine; but no decision of any English Court was brought to our attention; nor is there any such rule laid down in English books of authority.

I confess I am unable to see any sound principle on which such a rule can be rested; and in *The Warkworth*, 9 P. D. 20, Butt, J., said, that the fact that an Act of Parliament interfered with common law rights, was no reason why it should be construed differently from any other Act. See also the observations of Lord Tenterden in *Gale v. Laurie*, 5 B. & C. at p. 164. I think that is the sound rule, and that the Act in question is not to be read so as to exclude from its beneficial provisions the case of injury arising from the negligence of a fellow servant.

The appellants also made a great point of the answer of the jury, to the question whether the plaintiff had notice or knowledge, or ought to have had notice or knowledge, that the frog was not packed, the answer being, "We believe he did not have notice, and should have had notice." If we suppose the jury to have kept in mind the learned Judge's charge, then we must suppose, I think, they meant to say that unless he had shut his eyes, he would have seen that the frog was unpacked. But that question was referred to by the learned Judge in the early part of a some-

what lengthy charge, and I cannot be sure that the jury did recollect what he said. On the other hand, the form of the question itself, was somewhat calculated to suggest the other meaning.

Judgment.
MACLENNAN
J.A.

But if we take the meaning contended for by the defendants, I do not see that it helps them, in view of the finding that he did not have notice. If, in fact, he had not notice, it is, in my judgment, utterly immaterial how powerful the circumstances were which should, as it were, have compelled him to see that the frog was unpacked, so long as he owed no duty to the company to observe whether it was packed or not. If it had appeared that he was the person whose duty it was to pack the frog, or to see that it was done, then the finding, in the sense contended for, would be material; but no such duty was suggested, nor was that the sense in which the learned Judge submitted the question to the jury.

I think the appeal should be dismissed.

Appeal dismissed with costs.

HALL V. PRITTIE.

Assignment—Equitable assignment—Chose in action—Bills of exchange.

One E., who had a contract with the defendant for certain carpenter's work, gave to the plaintiff an order on the defendant in the following form :—

" Please pay to H. the sum of \$138.40 for flooring supplied to your buildings on D. road, and charge to my account."

Held, that this was not an equitable assignment, but a bill of exchange, and that in the absence of written acceptance by her, the defendant was not liable.

Judgment of the County Court of York reversed.

Statement.

THIS was an appeal from the judgment of the County Court of the County of York.

A builder named Edward Eyrie, who had a contract to build certain houses for the defendant, gave to the plaintiffs, who were lumber dealers in Toronto, the following order :

TORONTO, November 26th.

MRS. J. PRITTIE—

Please pay to William Hall & Son the sum of \$138.40 for flooring supplied to your buildings on Dovercourt Road, and charge the same to me.

The plaintiffs brought an action against the defendant to recover the amount referred to in this order and some other amounts, and the action was tried before McDougall, Co. J., at Toronto on the 4th of December, 1889, when judgment was delivered in favour of the plaintiff on the ground that the order in question was a good equitable assignment of the moneys referred to therein.

The evidence shewed that the order in question had been brought to the notice of the defendant or her agent, but it had not been accepted by her in writing, and there was a conflict of evidence as to whether there had been any oral acceptance or promise to pay. There was also a conflict of evidence as to whether after the date of the order and after the order had been brought to the notice of the defendant there were any moneys payable under the contract by the

defendant to Eyrie. It was shewn that mechanics' liens ^{Statement.} were filed against the property, and that shortly after the date of the order Eyrie made an assignment for the benefit of his creditors and left the contract unfinished. The defendant contended that Eyrie had been paid before the date of the order more than was in the result due to him.

An appeal by the defendant from the judgment of the County Court came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A.) on the 13th of March, 1890.

R. S. Neville, for the appellant.

J. S. Fullerton, for the respondents.

May 13th, 1890. BURTON, J. A. :—

This case has been treated by all parties apparently in the Court below as an equitable assignment by Eyrie to the plaintiff of a portion of the moneys payable or to become payable under his contract with the defendant and if that could have been made out I should have entertained no doubt upon the evidence that the decision of the learned Judge below was correct.

It was a well known doctrine in equity long before the Judicature Acts or our own Act in reference to assignments of choses in action, that a debt was assignable in equity and binding upon the debtor upon notice. But it would be a most dangerous extension of that doctrine to apply it to a mere order for the payment of money or a bill of exchange, which this instrument in question is. It is in this form :

[The learned Judge read the order and continued :]

There is nothing whatever upon the face of this instrument to indicate that it was intended as an assignment of any portion of the debt secured and payable under the contract, the words "for flooring, etc.," merely point to the consideration existing between Eyrie and the plaintiffs—equivalent to the words frequently found in similar docu-

Judgment.

BURTON
J. A.

ments, "for value received," - and the other words, "and charge to my account," though superfluous, are the words usually found in a draft or bill of exchange, and do not by any means indicate that the payment of the money to the bearer of the draft was to be made from any particular fund, but a direction to the drawee to charge the money to him. But even if the words of this document had gone to the extent of saying, "and charge the same to account of moneys payable under my contract with you," I should still hold that it could not be treated as an equitable assignment of any portion of that debt. The rule itself is perfectly clear that if these or similar words are used merely to designate the fund out of which the drawer may reimburse himself, or as a mere reference in the draft to the fund to call his attention to his means of reimbursement, then it is nothing more nor less than a direction, and the document is a bill of exchange. If on the contrary they are used to limit the payment or make the order itself payable only out of a particular fund, then the order is not a bill of exchange.

There can be no question that the document in question in this case has all the essential elements of a bill of exchange, and if so it is equally clear that it cannot be treated as an equitable assignment.

The distinction, I think, is very clear. If the order had been to pay to the plaintiff \$138.40 from moneys due or to become due under the contract, there would be a clear intimation to the defendant that to that extent the contractor had parted with his interest in the moneys accruing under the contract, and the defendant after that notice would deal with his original creditor at his peril. It may even in such a case appear hard to impose such an obligation upon people unacquainted with this rule of equity, and I quite agree with the opinions of those learned Judges who have held that the rule should not be extended; but it would be imposing a very serious additional responsibility upon persons engaged in business if a mere draft for the payment of money, which it was open to the

drawer to accept or not, would be obligatory upon him without acceptance merely because he had dealings with the drawer from which moneys might become due. If the instrument itself discloses the fact that a certain portion of those moneys has been transferred, that is a different matter, and having notice of such transfer the debtor cannot disregard it.

Judgment.
BURTON
J.A.

It is scarcely necessary to refer to authority to shew that if this is a bill of exchange it cannot be treated as an equitable assignment; perhaps no stronger case can be found than *Shand v. Du Buisson*, L. R. 18 Eq. 283, where the drawer had a fund in his hands and the party entitled to that fund drew a bill of exchange for the exact amount, and where it was endeavoured to treat it as an equitable assignment, a contention which Bacon, V. C., thus disposed of:

"I do not desire to narrow the jurisdiction that has been handed down to this Court, by which an equitable assignment has been dealt with by this Court; but it is entirely new to me to hear that a bill of exchange in an ordinary mercantile transaction in the shape in which this appears, can amount to an equitable assignment of the debt. * * * A mercantile instrument it is in its origin, and in that shape it remains, and has no other vitality or effect, and to call it an assignment of a debt would be to call it not by its right name."

If this point had been urged in the Court below I think the learned Judge would in all probability have given effect to it, and I do not think it right that the plaintiffs, whose claim is a perfectly honest one, should in addition to their other loss be saddled with the costs of this appeal.

OSLER, J. A. :—

The plaintiffs' difficulty is that they have failed to prove the allegation in the statement of claim that they procured from their debtor Eyrie an order upon the defendant for \$138.40 "of the moneys then due or accruing due from the

Judgment. defendant to Eyrie under her contract with the said Eyrie.”
OSLER
J.A. The order produced differs in no legal respect from an ordinary bill of exchange, and though the defendant, the drawee, may have verbally promised to pay it, she never accepted it and is not liable thereon. The only ground on which it was sought to charge her was that the order amounted to an equitable assignment of so much of the moneys as were then or would thereafter become payable to Eyrie, the drawer, under his contract with the defendant. But one of the very incidents which makes the instrument a valid bill of exchange, namely that it is not drawn against or payable out of any particular fund, prevents it from operating as an equitable assignment. It is clear that a bill of exchange is not an equitable assignment of the drawer's money in the hands of the drawee: *Shand v. DuBuisson*, L. R. 18 Eq. 283; *Hopkinson v. Forster*, L. R. 19 Eq. 74; *Lamb v. Sutherland*, 37 U. C. R. 143. And it is equally well settled that to constitute a valid equitable assignment there must be a specific appropriation of the whole or some part of an existing fund, or of a fund which is to arise out of some existing contract or agreement: *Lamb v. Sutherland*, 37 U. C. R. 143; *Brown v. Johnston*, 12 A. R. 190; *Lett v. Morris*, 4 Sim. 607; *Ryall v. Rowles*, 2 W. & T. L. C. 6th ed., at p. 841. In that respect this instrument is deficient. It was argued that the direction in the order to “charge to my account” was a sufficient indication of an existing fund. That point was unsuccessfully taken in *In re Farrell*, 10 Ir. Ch. R. 304 (1860). These words are nothing more than the ordinary language of a bill of exchange. They identify no particular specific ascertained fund or account against which the drawer has a right to draw, and do not affect its negotiability.

I have examined the evidence carefully in order to see whether sufficient proof of a parol assignment, apart from the order, might not have been established, for a parol assignment if clearly proved would be sufficient and the order might have been disregarded: *Heath v. Hale*, 4 Taunt. 326; *Gurnell v. Gardner*, 9 Jur. N. S. 1220; *Arm-*

strong v. Farr, 11 A. R. 186, and cases there cited. There is, however, no such evidence. All that was said or done seems to have been said or done with reference to the order itself. There is no proof of any independent agreement between the plaintiffs and Eyrie that so much of the moneys due under the contract should be assigned or made payable to the plaintiffs, as a consequence of which agreement the order was given.

Judgment.

OSLER
J.A.

The appeal must therefore be allowed, but I think without costs, and the action dismissed with costs.

HAGARTY, C. J. O., and MACLENNAN, J. A., concurred.

Appeal allowed without costs.

MACDONELL V. BLAKE.

Law Society—Bencher—"Retired Judge"—R. S. O. (1877) ch. 138, sec. 4.—R. S. O. (1887) ch. 145, sec. 4,

A Judge of a Superior Court of the Province of Ontario, who, after his voluntary resignation of his office, before he has become entitled to a retiring allowance, has been accepted, resumes the practice of his profession, is a "retired judge" within the meaning of R. S. O. (1877) ch. 138, sec. 4, and as such is an *ex officio* Bencher of the Law Society of Upper Canada.

Judgment of the Chancery Division, 17 O. R. 104, affirmed, BURTON, J.A., dissenting.

Statement.

THIS was an appeal from the judgment of the Chancery Division, reported 17 O. R. 104.

The action was brought to obtain a declaration that the defendant Blake was not *ex officio* a Bencher of the Law Society of Upper Canada, and to restrain him from sitting or acting as a Bencher of the said Society, and to restrain the Society from permitting or allowing him to sit or act.

The defendant Blake, then a barrister of the Law Society of Upper Canada, was, on the 2nd of December, 1872, appointed, by commission under the great seal of Canada, one of the Vice-Chancellors of the Province of Ontario, and fulfilled the duties of that office until the 9th of May, 1881, when he tendered to the Secretary of State for Canada, his resignation of the office. On the 18th of May, 1881, his resignation was accepted, and he then entered into the active practice of his profession as a barrister-at-law. He was not in receipt of any retiring allowance from the Government of Canada. Upon his resignation, and upon his resuming practice, the defendant Blake was treated by the Benchers of the Law Society of Upper Canada as *ex officio* a Bencher of the Society, and was appointed a member of different Committees of the Society, and exercised the rights and discharged the duties of a Bencher of the Society.

The plaintiff was a barrister and a member of the Law Society of Upper Canada.

The action came on by way of motion for judgment^{Statement.} before the Chancery Division, on the 28th of February, 1889, and on the 5th of March, 1889, judgment was delivered dismissing the plaintiff's action with costs.

An appeal from this judgment came on to be heard before this Court (HAGARTY, C. J. O., GALT, C. J. C. P., BURTON, and OSLER, JJ.A.) on the 18th of March, 1890.

J. Reeve, for the appellant. The defendant Blake is not a "retired judge" within the meaning of section 4 of R. S. O. (1887) ch. 145, and is therefore not *ex officio* a Bencher of the Law Society. The word "retired" used in its ordinary accepted sense is not applicable to one who resigns a public office for the purpose of actively engaging in work of some other nature. It is clearly intended to include only a judge, who, after the completion of the term of service which entitles him so to do, retires from his office upon a retiring allowance or pension, and gives up active duties: Maxwell on Interpretation of Statutes, pp. 24, 28, 67; *Caledonian R. W. Co. v. North British R. W. Co.*, 6 App. Cas. at p. 126; *Wood v. Preistner*, L. R. 2 Exch. at p. 68.

H. Cassels for the respondent Blake. The only mode by which a judge can become a "retired judge," is by resignation, and therefore at once upon the acceptance by the Governor in Council of the respondent Blake's resignation of his office of Vice-Chancellor of Ontario he became a "retired judge," and *ex officio* a Bencher. See 31 Vic. ch. 33 (D). The word "retired" in the section in question has no reference to the course of life upon which a judge may enter after his resignation has been accepted, but refers solely to the relinquishment of the position that he has been occupying. It is not by virtue of the retirement that the judge becomes entitled to exercise the dignity of a Bencher, but by virtue of his appointment to the high office of judge.

A. H. Marsh, and *W. Read*, for the respondents, the Law Society of Upper Canada. The words "resign" and "retire," are synonymous, no special meaning being attachable to the word "retire," and the words being used inter-

Argument. changeably by the Legislature in various Acts. By a "retired judge" is meant one who has resigned. See R. S. C. ch. 135, sec. 8; R. S. C. ch. 138, secs. 14 and 16; O. J. A. sec. 86; 33 Vic. ch. 15, sec. 41 (O).

J. Reeve, in reply.

May 13th, 1890. GALT, C.J.C.P.:—

[The learned Chief Justice stated the facts and continued:]

This is not an action by Mr. Blake claiming a right to sit as a Benchers, which right is disputed by the Law Society, but is brought by a member of the Society who contends Mr. Blake has not such a right; and further, that the Society has no right to permit him so to sit.

The Act in question changed the constitution of the Law Society, and it is manifest from what has taken place in this case, that in the opinion of the Benchers the expression "retired judge" meant a person who had filled a judicial office, and who at his own request was relieved from the discharge of his duty, in contradistinction to a person who had against his will been dismissed. This is in accordance with the words of the statute, but the plaintiff wishes to restrict the meaning to a person who not only retires by his own action, but who also receives a pension or retiring allowance.

As to the argument that because Mr. Blake has resumed the practice of his profession he is not within the words "retired judge":—I am not aware there is any provision which precludes a judge retiring on a pension from resuming his practice, although if he did so, some change might very properly be made in the law as respects legal pensions, but he would, according to the words of the statute and admission of the plaintiff, be *ex officio* a Benchers.

HAGARTY, C. J. O. :—

Judgment.

HAGARTY
C.J.O.

I have very little to add to the judgment just delivered, and the judgments of the learned Judges in the Court below. Whatever may have been the views of the Legislature in framing the Act under which the question arises, we can only ascertain them by the words they have used.

I think we are bound to consider that the words “any retired judge of the Supreme Court,” include any judge of such Court who has resigned his office into the hands of His Excellency the Governor General, and whose resignation has been duly accepted.

I feel great difficulty in accepting the argument that a resignation with a view of resuming legal practice, or of embarking in any commercial adventure, or taking Holy Orders, can possibly affect the question after the appointing authority had duly assented to the relinquishment of the judicial position.

The intention to enter into any particular occupation may exist as the operating cause of the resignation, or it may be adopted a month or a year afterwards. In neither case does it appear to me to alter the status of “retired judge.”

If the appointing power had refused to accept the resignation, it might be otherwise; but acceptance must at once confer the required status.

If a judge had been removed from his office on a joint address from Parliament, we could not call him a retired judge.

I cannot annex as a condition to becoming a retired judge that the pension which Her Majesty by Letters Patent under certain circumstances grants to such judge, must be shewn to have been awarded in the present instance. I think the defendant's right to the *ex officio* position claimed by him is irrespective of any such grant.

I think we must dismiss the appeal.

Judgment. OSLER, J.A. :—

OSLER
J.A.

I think the judgment of the Chancery Division is right. The plaintiff's counsel was obliged to admit that there is nothing to prevent one who has been a judge, and who has been allowed to retire with a pension, from resuming his practice at the Bar, and I believe instances of that are not wanting in other provinces even in the case of a retirement from the Bench of the Superior Court. *A fortiori*, such an one is not debarred from practising when he retires from the Bench without a pension.

The anomaly of a practising barrister who has been a judge being called upon to act as judge *ad hoc*, under the various statutory provisions in that behalf, is not greater in the one case than in the other, or than in the case of a Queen's Counsel. Whether a judge retires with a pension, or without one, he must resign, and his resignation must be accepted. In either case he is properly described as a judge who has retired from the Bench, for his retirement is not the act of the government, but the joint act of the government and himself. It might be different if his retirement did not essentially depend upon his resignation, so that the expression "retired judge" might be held to mean one who had "been retired" by the Government with an accompanying pension independent of any action on his own part. So a judge who has been removed from the Bench cannot in any sense of the word be deemed a retired judge. On the whole I see no warrant, beyond what may perhaps be said to have been a general impression among the profession, for the contention that a pension is essential to constitute a judge who has resigned, "a retired judge" within the meaning of the Law Society Act. The Act does not attach that qualification to the term, and I think we are not at liberty to do so. Therefore I am of opinion that the appeal should be dismissed.

BURTON, J. A. :—

Judgment.

BURTON
J.A.

The sole question in this case is as to the meaning of the words “any retired judge” as found in section 4 of the Act respecting the Law Society, and I am quite free to admit that previously to the action of the Benchers in admitting Mr. Blake to his position as an *ex officio* Benchers of the Society, I had always thought, and I believe it was the general opinion of the profession, that they pointed to a judge who, having served for the full period of fifteen years or upwards, became entitled to expect from the Crown a retiring allowance, and had been granted such allowance.

I have heard nothing in the arguments addressed to us to induce me to change that opinion, and the language of the Act referred to by Mr. Cassels rather confirms me in it.

I quite admit that the words resign and retire may be used interchangeably as meaning the same thing, and I quite agree with the contention that a judge cannot be a retired judge until his resignation has been sent in and accepted, but that, with great deference, does not necessarily lead to the result at which the learned Judges of the High Court have arrived.

The words of the 31 Vic. ch. 33 (D.), relied on by Mr. Cassels—if any judge resigns his office—are apt and proper words enough to describe the position of a judge who has at any time resigned his office, and whose resignation has been accepted, but their relevancy to the present enquiry is derived from the reference to the period of service, and from what follows, viz. :

Her Majesty may, by Letters Patent under the Great Seal of Canada, reciting such period of office, grant unto such judge an annuity equal to two-thirds of the salary annexed to the office ; but when referring in the schedule to the salaries of judges and the annuities to judges who have resigned under the circumstances mentioned, they are referred to as *retiring* allowances.

When we look back again to the section of the Law

Judgment.

BURTON
J.A.

Society Act, we find among the persons who are declared to be *ex officio* Benchers, the following:

1. The Attorney-General of Canada.
2. Any person *who has held that office*, if a member of the Bar of Ontario.
3. The Attorney-General of Ontario.

4. All members of the Bar *who have at any time held the office of Attorney or Solicitor-General*; and then when we come to the remaining official who is declared to be *ex officio* a Bencher, we find an entire change of language. It is not as in the case of the Ex-Attorney or Solicitor-General, any person *who has held the office of judge*, but one of a particular class, that is, "*any retired judge*;" and when we find that only a judge who has served the requisite period is entitled to what the Dominion Statute refers to as a retiring allowance, I think the proper construction to place upon those words is to hold them to refer to some one coming within that class—a judge who has been retired or placed upon the retired list—any other construction would be doing violence to the language used, and be a very strained one. A "retired judge" would be very stilted and peculiar language to use as describing any one who had simply ceased to hold the position of judge; but when applied to one who has become entitled to, and has been granted, a retiring allowance, it becomes intelligible enough, and correctly describes his position. I cannot see how Mr. Blake in any way comes within such a definition. I do not attach any weight to the argument that he resigned for the express purpose of returning to the active practice of his profession. A judge who had served for the full period might resign with such intention, but if that fact were known to the Executive it might influence them in granting or withholding a retiring allowance, and in the latter alternative he would not, in my opinion, be a retired judge.

I think a reference to other statutes passed by the same Legislature aid this construction, for it is presumed that the Legislature uses the same language in the same sense

when using it at different times, and therefore when we find words used which, in their largest sense, might include every judge who had resigned or retired, we must, looking at these enactments, give them the meaning which best suits the scope and object of the statute, and restricts the meaning to what must be held to have been in the mind of the Legislature when passing it.

First, the members of the Bench (other than the *ex officio* members) are elective, and Mr. Blake when he returned to the Bar was eligible for election, which a judge retired upon an allowance would not be.

The Act respecting the Courts of Queen's Bench and Common Pleas provides that a retired judge may at the request of the judge or judges with whom he is so requested to sit, sit in the Superior Courts of Law, and give judgments in all cases before those Courts.

The Courts of Assize may be presided over by a retired judge, and in the same way in the County Court Act, a retired judge is authorized to hold a Court either at the request of the judge or on being authorized by the Governor General.

These Acts do not say that any person who has at any time filled the position of judge shall be eligible to sit in these Courts, and it would be perhaps unreasonable to expect a gentleman actively engaged in the practice of his profession to respond to a request which might seriously interfere with his practice, and somewhat unseemly for him to occupy the dual position, whilst in the case of a retired judge the country would have something like a moral claim to his services.

It appears to me that these considerations all point in these Acts relating to the Courts, at all events to the intention of the Legislature having been to use the word in the sense of a class known as "retired judges," in the same way as we speak of a retired captain or an admiral on the retired list, and when we find in the Law Society Act similar words used, we ought to adopt what seems to be the natural meaning of the words, and not go afield for a

Judgment.

BURTON
J.A.

Judgment.

BURTON
J.A.

construction which might lead to serious difficulties and inconveniences.

As to authority for reading the words "retired judge" in the sense in which (looking at their use in the Judicature Act) I think they should be read—the books are full of cases much stronger than the present. For instance, in *Regina v. Pilkington*, 2 E. & B. 546, the word "single woman" to be found in the Statute 7 & 8 Vic. ch. 101, was held to extend to a married woman living apart from her husband.

In the case of *The Lion*, L. R. 2 A. & E. 102, under a statute which imposed upon "a ship carrying passengers" the obligation of taking a pilot on board, it was held that persons being carried who had not paid their fare were not passengers within the meaning of the Act.

The word "debts," or "just debts," as used in 30 & 31 Vic. ch. 6, held not to include mortgage debts.

The word "soil," which *primâ facie* would include everything above or below the surface in an Inclosure Act, was held to mean surface only.

So when we find the Legislature in the same section, referring to some officials as persons who have at some time filled a particular office, and departing from that language when referring to a judge, and instead of referring to all persons who have at any time filled the position, using a term which in common parlance is as I have said well understood as referring to a particular class, I think I am violating no canon of construction when I adopt it as meaning what I think almost every layman would understand as a retired judge, and what I feel, looking at the powers and duties cast upon them by the Judicature Act must have been in the mind of the Legislature.

I am of opinion, therefore, that by a retired judge was meant a judge whom Her Majesty had allowed to retire or to be placed on the retired list with a retiring allowance, and that the judgment should be reversed, and this appeal allowed.

I wish to add that we are not concerned as to the nature

of the proceeding, or the fact that the plaintiff might or might not have a *locus standi* if that question had been intended to be contested.

Judgment.
BURTON
J.A.

The question comes before us as upon a case stated for the sole and express purpose of obtaining our decision upon this one point alone, and it is therefore quite immaterial whether it comes before us in a suit by this plaintiff disputing Mr. Blake's right, or on his application to compel the Society to admit him, or in any other form.

Appeal dismissed with costs,
BURTON, J. A., *dissenting.*

SHAIRP V. THE LAKEFIELD LUMBER COMPANY.

Crown lands—Free grants—Crown timber—Timber license—Trespass—Patent—Reservation—R. S. O. (1887) ch. 25, secs. 4, 10—R. S. O. (1887) ch. 28.

The plaintiff was in March, 1884, located as the purchaser of a lot in the township of Burleigh and obtained a patent therefor in November, 1888, the patent being in the usual form of a patent in fee to a purchaser, without any reservation of timber or any reference to the "Free Grants and Homesteads Act." The defendants, assuming to act under a timber license issued in May, 1888, covering this and other lots, entered upon the lot after the issue of the patent and took timber therefrom. In the license the lot was referred to as "located and sold." The township of Burleigh was within the geographical limits described in section 4 of the Free Grants and Homesteads Act, R. S. O. (1887) ch. 25, but had never been appropriated or set apart as Free Grant lands under the provisions of that Act:—

Held, that the lot was not "land located or sold within the limits of the Free Grant Territory," within the meaning of that Act, and that the patent was not subject to the reservations as to timber in that Act contained.

The expression "Free Grant Territory" in section 10 does not refer to the whole territory or tract defined in section 4 but only to such portion of that territory or tract as may be actually set apart and appropriated by the Lieutenant-Governor in Council under the Act.

Held, further, that there being no actual reservation in the patent the defendants had no right to cut the timber after its issue and were liable in damages.

Judgment of MACMAHON, J., affirmed.

Statement.

THIS was an appeal from the judgment of MACMAHON, J. The action was brought to recover damages for trespass in cutting timber on the plaintiff's land, being lot 15 in the 14th concession of the Township of Burleigh. This township was within the geographical limits described in section 4 of the Free Grants and Homesteads Act, R. S. O. (1887) ch. 25, but had not been specifically set aside or appropriated by the Lieutenant-Governor in Council for the purposes of that Act.

The plaintiff was located as the purchaser of the lot on the 13th of March, 1884, and a patent was obtained by him therefor on the 24th of November, 1888. The patent was in the usual form of a patent in fee to a purchaser. It recited the agreement for purchase and payment of the purchase money, and contained no reservation of the timber, nor any reference to the Free Grants and Homesteads

Act. The defendants, assuming to act under a timber Statement. license, dated the 3rd of May, 1888, giving the right to cut timber on the lot in question, and other lots mentioned therein, entered upon the lot in January, 1889, and cut down certain timber. The plaintiff's lot was referred to in the license as sold and located on the 13th of March, 1884.

The action was tried before MACMAHON, J., and a jury at Lindsay, at the Spring Assizes of 1889, when the damages were assessed at \$530.50, judgment being reserved upon the legal questions.

Judgment was subsequently delivered in favour of the plaintiff for the full amount assessed by the jury.

The defendants appealed, and the appeal came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A.) on the 19th of March, 1890.

Poussette, Q. C., and Aylesworth, for the appellants. The lot in question is within the geographical limits of the Free Grant territory, and is therefore subject to the provisions of the Act, R. S. O. (1887) ch. 25. Under section 10 of that Act, pine trees growing or being upon land located or sold within the limits of the Free Grant territory, are reserved from location and remain the property of Her Majesty; and under section 11, the licensee has the right to cut timber or saw logs on such land. The words "Free Grant territory," in section 10, refer not only to lands actually appropriated as free grants to actual settlers under section 3, but to the whole territory mentioned in section 4. Lands sold as well as located, are expressly mentioned in section 10, while section 3 contemplates the setting apart of lands as free grants, and lots so set apart could not afterwards be sold, so that more is included in section 10 than in section 3. Even if the Free Grants Act does not apply, the defendants are entitled to succeed. At the time the lot in question was sold to the plaintiff, it was included in a timber license of which the license under which the defendants' claim is a renewal. It is true that under the Crown Land Regulations of May, 1869, trees remaining on the land at the time

Argument.

the patent issues, are to pass to the patentee, but this provision cannot affect a prior licensee, for the license is not revoked by the issue of the patent: *Farquharson v. Knight*, 25 U. C. R. 413; *McMullen v. Macdonell*, 27 U. C. R. 36; *Contois v. Bonfield*, 25 C. P. 39; *Anderson v. Muskoka Mill & Lumber Co.*, 27 C. P. 180. The three years period after location mentioned in these regulations, does not apply to the case of land which has been actually under license before the date of location. It is intended to cover the case of land which has never been under license. Where a license has actually been issued before the date of location, the licensee has a vested right of renewal of the license, and does not lose his right until the issue of the patent: *Gilmour v. Buck*, 24 C. P. 187. The license is in fact a grant of the pine trees, and is not affected by the subsequent issue of the patent.

Watson, Q. C., and *E. B. Edwards*, for the respondent. The Timber License Act, R. S. O. (1887) ch. 28, expressly provides that no license shall be granted for a longer period than twelve months from the date thereof, and a license expires at the end of the license year in which it is issued. The validity of the license in question therefore must be decided at the time of its actual issue, and cannot be referred back to the time of the issue of the first license, of which the present license purports to be a subsequent renewal. Under the regulations governing this case, no license can be granted to take effect after the expiration of three years from the time of the location or sale of the land and the license under which the defendants seek to justify their trespass is invalid on this ground. Then these regulations also provide that all trees on the land at the time the patent issues shall pass to the patentee, so that on this ground also the plaintiff is entitled to succeed. The lot in question is not in any way subject to the Free Grants and Homesteads Act. The township of Burleigh has not been specifically appropriated or set apart for the purposes of the Act, and the reservations in section 10 apply only to such land as has

been specifically appropriated or set apart. Here the Argument, patent has been given to the plaintiff as absolute purchaser and contains no reservation or condition whatever as to pine or other timber. Clearly, therefore, the pine and other timber became and were the property of the plaintiff.

Poussette, Q.C., in reply.

May 13th, 1890. OSLER, J.A. :—

The principal question is, whether the plaintiff's land can be said to be land located or sold within the limits of the Free Grant territory within the meaning of the Act respecting Free Grants and Homesteads to actual settlers on public lands, R. S. O. (1887), ch. 25, so as to be subject to the reservations in the Act and Orders in Council made in pursuance of it respecting pine timber thereon.

Section 3 of the Act enacts that the Lieutenant-Governor in Council may appropriate any public lands considered suitable for settlement and cultivation, not being mineral or pine timber lands, as free grants to actual settlers under such regulations as shall from time to time be made, not inconsistent with the provisions of the Act.

Section 4. Such grants or appropriations shall be confined to lands surveyed or hereafter to be surveyed, situate within "the tract or territory" defined in the section.

The township of Burleigh is within this tract, but none of the public lands therein have ever been appropriated or set apart by the Lieutenant-Governor in Council for the purposes of the Act. In other words it is not what is commonly called a "free grant township." The defendants rely upon section 10, which enacts that pine trees growing or being upon land located or sold, within the limits of the Free Grant territory after the 5th of March, 1880, shall be considered as reserved from the location, and shall be the property of Her Majesty; and upon section 11, which enacts that the patents for all lands located or sold, as aforesaid, shall contain a reservation of all pine trees standing or being on the land, and any person now or hereafter hold-

Judgment.

OSLER

J.A.

ing a license to cut timber or saw logs on such lands, may at all times during the continuance of the license, enter upon the uncleared portion, and cut and remove trees, and make necessary roads, &c.; and they contend that the "territory" mentioned in section 10 is the whole tract or territory defined in section 4, or that out of which appropriations for free grants may be made, and not merely that which has been set apart and appropriated by the Lieutenant-Governor in Council for that purpose, which is the plaintiff's contention.

It appears to me having regard to the whole Act and the course of legislation that the expression "Free Grant territory," in section 10, is not necessarily to be construed as meaning the territory or tract defined in section 4.

Sections 10 and 11 were introduced into the Free Grants Act, then R. S. O. ch. 24, by the Act of 1880, at which time a very large number of townships had been brought under the Act and appropriated as free grant lands by the Lieutenant-Governor in Council, and as such constituted a Free Grant territory. All lands not so appropriated remained unaffected as ordinary Crown or public lands, for as section 10 formerly stood there was no room for the argument which has been built upon its amended form.

The Act relates to free grant settlers, and to land located or sold to them under its provisions, and the rights of license holders over such lands.

The intention of sections 10 and 11 manifestly was, and is, to preserve to the Crown the right to pine timber on such lands notwithstanding the location and sale, and subsequent patent—to change in short the law as it was under the former section, by which all trees remaining on the land when the patent issued passed to the patentee. Section 14, the origin of which is 40 Vic. ch. 15, sec. 2, was left unaltered, and it throws light upon the meaning of the expression. It enacts (*inter alia*) that every license issued to cut timber within the limits of any territory appropriated as Free Grant territory, shall be deemed to be good and valid for the period for which it

may be granted, notwithstanding the patent for lands included therein may have been issued, and every license shall confer upon the holder the right to cut timber on the lands included therein until its expiration, whether located or unlocated, sold or unsold, subject to such conditions, regulations, and restrictions specially applicable to the said Free Grant territory as may have been heretofore, or may be hereafter, made by the Lieutenant-Governor in Council.

Judgment.

OSLER

J.A.

Here the free grant territory alluded to is evidently that which has been appropriated as such under section 3, and I think it cannot have been intended to place public lands not so appropriated, even though in that part of the Province within which the appropriation might be made, in a different position from other public lands in respect of which the rights of the purchaser and license holder are defined by the Act respecting Timber on Public Lands, R. S. O. (1887) ch. 28, and regulations made by the Lieutenant-Governor in Council thereunder. See also the preamble of 34 Vic. ch. 5, which speaks of lands "forming part of the public lands appropriated for free grants."

It was argued that as section 10 refers to lands located or *sold* within the limits of the Free Grant territory, lands not appropriated for free grants are included if within the territory out of which the appropriation may be made; but this appears to me to relate to the regulations of May, 1869, under which the free grant locatee is entitled to purchase an additional 100 acres at the time of his location, subject to the same reservations and conditions and performance of the same settlement duties as provided in respect of the free grant location.

The plaintiff is therefore not a locatee or purchaser under the Free Grant Act and regulations, and as the patent contains no reservation of the pine trees as required by section 11, the Crown evidently took that view of his position. As purchaser and patentee he is subject only to the rights conferred by the license under which the defendants claim, unaffected by the provisions of the Free Grant Act and regulations.

Judgment.

OSLER
J. A.

Now the license itself in terms limits and defines the rights of the holder in such a way as to exclude the plaintiff's lot from its operation, at all events from the moment of the issue of the patent. It gives him license and power to cut every description of timber (1) on lands unlocated, and unsold at the date thereof, viz., the 30th of May, 1888, or (2) sold or located during the time it is in force, *i.e.*, up to the 30th of April, 1889; (3) pine trees on lands or lots sold under orders in Council of 27th of May, 1869; (4) pine and cedar trees, when reserved, on lots sold under Order in Council of 3rd of April, 1880, upon the location described on the back of the license. Other classes of lots are referred to in the license, but as they are free grant lots and mining lands, I do not specify them.

As the plaintiff's lot was located and sold long before the date of the license, viz., on the 13th of March, 1884, and as no reservation was made on the sale of the lot, of pine and cedar under the Order in Council of 3rd of April, 1880, the only regulations applicable are the pine timber regulations of 27th of May, 1869. These provide that "all pine trees on any public land thereafter to be sold, which at the time of such sale or previously was included in any timber license, shall be considered as reserved from such sale, and shall be subject to any timber license covering or including such land in force at the time of such sale, or granted within three years from the date of such sale, and such timber may be cut and removed from such land under the authority of such timber license while lawfully in force.

"All trees remaining on the land at the time the patent issues shall pass to the patentee."

On the back of the license is a schedule of lots included in the location, with the date of sale or location, and the plaintiff's lot is stated therein to have been sold or located on the 13th of March, 1884.

I have already in the recent case of *McArthur v. Northern and Pacific Junction R.W. Co.*, 17 A. R. 86, expressed the opinion that the express provisions of section 1, sub-

section 2, of the Timber License Act, R. S. O. (1887) ch. 28, require us to hold that each yearly license stands by itself, so that what in popular language is called the renewal cannot be regarded as the extension of the license of a previous year, and so relate back to the earliest license. The defendants, therefore, in my opinion acquired no right over the plaintiff's lot at the date of their license, as more than three years had then elapsed from the date of the sale of the lot.

Judgment.

OSLER
J.A.

But even if the license was effectual for any purpose at the date of issue, there is another difficulty quite as formidable in the defendants' way. The license was subject to the conditions, &c., established by the Lieutenant-Governor in Council, and among others to those of the Order in Council of the 27th of May, 1869, of which the defendants must be taken to have had actual notice, as it is one of those referred to in the license.

One of the conditions and regulations of that order is, that all trees remaining on the land at the time the patent issues, shall pass to the patentee. The defendants, therefore, to adopt the language of Gwynne, J., in *Anderson v. Muskoka Mill and Lumber Co.*, 27 C. P. at p. 182, a decision under the Free Grants Act, took the license with actual notice in fact and in law that the land in question was located or sold on the 13th of March, 1884, and that upon the issuing of the patent to the locatee, he would *eo instanti* become seized of all the trees growing upon the lot.

For these reasons I am of opinion that the judgment at the trial was right, and that the appeal should be dismissed.

MACLENNAN, J. A. :—

I am of opinion that this appeal should be dismissed.

I think it is clear that the plaintiff's land was not land within the limits of the Free Grant territory within the meaning of section 10 of R. S. O. (1887) ch. 25, the Free Grants and Homesteads Act.

For the purpose of construction this section must be read

Judgment.
MACLENNAN
J.A.

in connection with sections 3 and 4. Section 3 authorizes the Lieutenant-Governor in Council to appropriate any public lands, &c., as free grants to actual settlers under regulations to be made by order in council, and section 4 declares that such grants or appropriations shall be confined to lauds situate within a certain defined tract or territory. It appears that from time to time after the year 1868, when the Free Grants Act was first enacted, the Lieutenant-Governor in Council set apart different townships in this tract, as free grant townships, in which alone free grants and homesteads were given to settlers under the regulations. But the township of Burleigh, in which the lot in question is situated, never was so appropriated, and never was a free grant township. Section 10 of the Act as originally worded in 1868 did not contain the words "free grant territory," and these words were used for the first time in 1880, when the section was amended by 43 Vic. ch. 4, sec. 2. The words themselves do not necessarily import the whole of the tract or area mentioned and described in section 4, and having regard to the manner in which the Act had been administered by the Lieutenant-Governor in Council, before the Act of 1880, I think the words must be held to mean only so much of the tract described in section 4, as had been or might in time be appropriated or set apart by Government for the purposes of the Act.

If I am right in the conclusion I have come to on the first point, the Free Grants Act, and the regulations made under it, are inapplicable to the present case, and the plaintiff's rights depend altogether upon the Public Lands Act, R. S. O. (1887) ch. 24, and the Timber License Act, R. S. O. (1887) ch. 28, and the regulations made under them respectively.

By section 15 of the Public Lands Act the rights of purchasers are defined, and they are put as high as those of a patentee, against all persons but the Crown, except that it is declared, they shall have no force against a license to cut timber existing at the time of granting thereof.

The Timber License Act limits the duration of licenses to twelve months from their date and vests in the licensee in the most absolute manner all trees cut during the term of the license. The licenses are to be granted subject to such conditions, regulations, and restrictions, as may be made from time to time by the Governor in Council.

Judgment.
MACLENNAN
J.A.

Most of these regulations now in force under the Timber License Act, so far as concerns the present action, were made on the 16th of April, 1869, but there is another which is also very important, made in the following month, namely the 27th of May, 1869.

The regulations of the 16th of April provide, among other things, for a renewal of licenses by the holders upon compliance with all existing regulations, and it was argued before us that the defendants, who claim to have had licenses over the land in question for seventeen years before action, regularly renewed from time to time, were entitled by virtue of this right of renewal to be regarded as persons having an uninterrupted license during the whole of that period.

It is no doubt true that the right of renewal is a most valuable one, but it is not given expressly by the statute, and arises altogether from the regulations of the Governor in Council; therefore while the defendants had, and availed themselves of, the right of renewal, from year to year, that right was always subject to the other order of the 27th of May, 1869, referred to in the judgment.

By the plain terms of this last order a licensee may take the timber, under any license, either existing at the time of a sale, or issued within three years from the date of sale, but he is to do it under the authority of such license "while lawfully in force."

It is very plain, I think, that what is here referred to is not a renewal, or right of renewal, but it is the actual annual license itself. It was pressed upon us that in the early part of the order it is said without qualification that as to all future sales the timber shall be considered as reserved from such sale, and that therefore the reservation was absolute. I think, however, that means no more than

Judgment. that the timber is reserved to the extent of the words
MACLENNAN mentioned, namely, until the expiration of the existing
J.A. license, if any, and of any license that may be granted within three years from the sale.

The order goes on to say that all trees remaining on the land at the time the patent issues shall pass to the patentee, and it may be that in view of the last clause of section 15 of the Public Lands Act, this part of the order must be read as meaning that the timber shall pass to the patentee, not immediately, but at the expiration of the existing license, or of any one granted within the three years.

In either view the defendants fail; for all the licenses which they received within three years after the sale to the plaintiff, had expired before the patent issued, and it was after the issue of the patent that the cutting complained of was done.

It is remarkable that in *Contois v. Bonfield*, 25 C. P. 39, and *S. C.* in this Court, 27 C. P. 84, the Order in Council of the 27th of May, 1869, was not referred to, or relied upon on behalf of the plaintiff, although it was then in force, and if valid, would have entitled the plaintiff to recover. In that case the cutting was done by the licensee, under a license of the year 1873-4, which was a renewed license issued within the first year after the sale and patent to the defendants, and it was held in this Court, affirming a judgment of the Court of Common Pleas on a demurrer, that the renewed license was void as against the patentees, notwithstanding an agreement in writing between the latter and the Commissioner of Crown Lands that the patent should be subject to a renewal of the license.

I am therefore of opinion that the judgment appealed from is right, and should be affirmed, and that the defendants not having taken the timber before patent, or before the expiration of the last of their licenses issued within three years from the date of the sale to the plaintiff, thereby lost it, and that it passed to the plaintiff.

HAGARTY, C.J.O., and BURTON, J.A., concurred.

Appeal dismissed with costs.

IN RE HERR PIANO COMPANY.

Trusts and trustees—Breach of trust—Following trust moneys.

Three persons occupying a fiduciary position towards a bank, became partners in a firm, agreeing to pay for their interests a certain sum of money in liquidation of creditors' claims. They did pay this sum but out of moneys of the bank wrongfully appropriated by them. Subsequently the firm was formed into a joint-stock company, and the assets of the partnership were assigned by the partners to the company. The company soon afterwards failed, and a winding-up order was made, the original assets, upon which the bank claimed a lien, to a considerable extent coming into the possession of the liquidator.

Held, that the original partners were not affected with constructive notice of the means by which the incoming partners obtained the moneys brought in, and that no actual notice to them or to the company being shown the bank had no lien.

Judgment of the County Court of York reversed.

THIS was an appeal from the judgment of McDougall, Statement.
Co. J., in an interpleader issue tried before him to determine the question whether the liquidators of the Central Bank of Canada were entitled to rank upon the estate of the Herr Piano Company, (Limited.)

The Herr Piano Company was being wound up under the provisions of the Ontario Winding-up Act, and the liquidators of the Central Bank of Canada filed their claim for \$25,334.01, the amount of two promissory notes, one for \$2,001.54, and the other for \$551.28, made by the Herr Piano Company, and endorsed by D. Mitchell McDonald, and discounted by him with the Central Bank of Canada before its failure, and of a certain overdraft. The claim as far as the two notes were concerned was admitted, but as to the overdraft was disputed.

The overdraft in question was an overdraft of David Blain, president of the Central Bank, and vice-president of the Herr Piano Company, and D. Mitchell McDonald, a director of the Central Bank, and managing director of the Herr Piano Company.

Prior to the 9th of March, 1887, Jacob Herr and Messrs. Donaldson and Milne, were carrying on business in partnership for the manufacture of pianos, organs, and other

Statement.

musical instruments, under the name of the Herr Piano Company. By an agreement of that date made between Jacob Herr, of the first part, Donaldson and Milne of the second part, David Blain of the third part, A. A. Allen, (who was manager of the Central Bank), of the fourth part, and D. Mitchell McDonald, of the fifth part, it was agreed, amongst other things, that the partnership theretofore subsisting between the parties of the first and second parts should be dissolved, and that the assets of the co-partnership, including book accounts, notes, contracts, property, rights, and credits, should be vested in the five parties to the instrument in certain proportions; Herr to have eight parts; Donaldson and Milne jointly, thirteen parts; Blain, Allen, and McDonald jointly, sixty parts. The value of the assets, including machinery, plant, &c., was placed at about \$21,000. It was also stated in the agreement that the liabilities of the partnership did not exceed \$11,650.28; and it was agreed that the parties of the first and second parts should pay any liabilities in excess of that sum. The parties of the first and second parts, were also to give a note of \$2,500 to make the value of their share equal to the value of the thirteen shares assigned to them. The parties of the third, fourth, and fifth parts agreed to pay into a special account, as moneys might from time to time be required, the sum of \$5,000 each, to be used in paying off the liabilities of the company to the extent of the said \$11,650.28, and for the purpose of carrying on the business. It was also stated in the agreement that the intention of the parties was to carry on business and to incorporate the company, and it was declared that the business should be carried on prior to incorporation under the direction of Donaldson, Blain, Allen, and McDonald, as a board of directors, with Herr as manager and mechanical superintendent. It was also stipulated that Blain, Allen, and McDonald should incur no personal liability; and Allen and McDonald were alone empowered to draw or accept drafts, sign or endorse notes, in the name of the Herr Piano Company, for carrying on

the business. Provision was also made for the opening of ^{Statement.} an account with some bank in the name of the Herr Piano Company, to the credit of which all moneys coming in in the ordinary course of business should be paid, and cheques were to be drawn by Allen and McDonald jointly, or in the absence of one, by either of them.

A charter of incorporation was obtained under the Ontario Joint Stock Companies Act on the 8th of June, 1887. The incorporators were David Blain, A. A. Allen, D. Mitchell McDonald, John Donaldson, R. Y. Milne, and Jacob Herr. The charter stated that the capital was \$75,000, and that the stock taken by Blain, Allen, and McDonald, was \$10,000 each; by Donaldson and Milne jointly, \$6,500, all of which amounts were stated to have been paid up in full by transfer of property; and by Jacob Herr \$7,000, of which \$4,000 was stated to have been paid up by transfer of property. Blain, Allen, McDonald, and Donaldson were stated to be the first directors of the company.

By an agreement, dated the 5th of August, 1887, and made between the several parties to the agreement of the 9th of March, 1887, and the Herr Piano Company, the parties to the agreement of the 9th of March, 1887, transferred all their interest in the business to the Herr Piano Company, together with all assets, &c., and the company assumed all contracts and liabilities entered into or incurred by the parties to the agreement of March, 1887, "for which they have become jointly liable in carrying on the said business since the said agreement;" and there was a covenant on the part of the Herr Piano Company to indemnify and save harmless these parties against all loss, &c. The consideration for the agreement was expressed to be, the allotment of paid up shares to the amounts above mentioned, and these shares were duly allotted.

This agreement, however, was executed only by Herr, Donaldson, and Milne. The day after the execution of the agreement by them Donaldson and Milne sold their stock to D. Mitchell McDonald, who paid them therefor in cash

Statement. \$6,350, and the stock was transferred to him and to Blain and Allen.

Blain and McDonald had also put into the business \$15,000 as agreed, the moneys being paid to D. Mitchell McDonald, and by him being applied in various cheques from time to time in paying the liabilities and running expenses of the company before the incorporation. All the funds had passed through McDonald's account in the Central Bank of Canada. On the 24th of October, 1887, a cheque for \$21,954.64, signed by Blain and McDonald, was deposited to the credit of McDonald's account, and was debited to another account of "D. Blain and D. M. McDonald, special;" This amount, \$21,954.64, represented apparently the \$15,000 paid by Blain, Allen and McDonald for their interest in the Herr Piano Company, and the \$6,350 paid for Donaldson and Milne's stock, with the sum of \$604.64 added for interest. The Central Bank failed on the 15th of November, 1887, and at that time McDonald's account was overdrawn \$61,421.74, and there were besides promissory notes of his accruing due to the amount of about \$40,000 more.

The Herr Piano Company went into liquidation on the 11th of February, 1888, and the liquidators of the bank filed their claim on the 25th of April, 1888. It was conceded subsequently that as to the \$6,350 paid to Donaldson and Milne for their stock, no recovery could be had against the Herr Piano Company, but as to the \$15,000 and interest, a lien was claimed on 60-81 of the assets of the Herr Piano Company, that is to the extent of the interest of Blain, Allen and McDonald in these assets, the ground taken being that in obtaining funds from the Central Bank to acquire their interests in the Herr Piano Company, Blain, Allen and McDonald had been guilty of a breach of trust towards the bank, and that this money could therefore be followed into the property acquired with these funds, the company having full notice of the breach of trust, the trustees guilty of the breach of trust and the controlling officers of the company being the same persons.

An issue was directed and was tried before MACDOUGALL, *Statement*. Co. J., on the 6th of February, 1889, and several subsequent days, and it was clearly proved that the moneys obtained by McDonald from the Central Bank were so obtained by him without the knowledge of the directors, and by means of a private arrangement between himself, and Blain, and Allen.

It was also proved that to a large extent the assets of the piano company existing at the time of the agreement of March, 1887, were still in existence at the time of the winding-up order, and passed into possession of the liquidator.

The learned Judge held that the liquidators of the Central Bank had a preferred claim up to \$15,000 on 60-81 of the original assets of the piano company ascertained to be in existence and in the possession of the piano company at the date of the winding up order, and that they were entitled to rank on the estate of the piano company as ordinary creditors for the amount of the notes above referred to.

The liquidator of the piano company appealed from this judgment, and the appeal came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 20th of March, 1890.

J. K. Kerr, Q. C., and *R. S. Neville*, for the appellant. The learned County Judge had no jurisdiction to try the question whether the liquidators of the Central Bank were entitled to a lien or charge on the assets of the piano company, or any part thereof, but only whether they were entitled to rank on the estate as creditors: R. S. O. (1887) ch. 183, sec. 23. Assuming, however, that the Judge had jurisdiction to entertain the question at all, still his decision is erroneous. The bank never were creditors of the company, and never had any dealings with the company. The company were *bonâ fide* purchasers for value of the assets in question, and such assets could not be followed into their hands, or be impressed with any trust, lien, or charge

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as against them, on account of any breach of trust which may have been committed by their vendors, or any of them. The finding of the learned Judge that the company had notice of such breach of trust by reason of the knowledge of their president and managing director, is erroneous. Such knowledge, if any, was not obtained while they were officers of the company, but before the company came into existence, and at the time the company acquired the assets, none of its officers knew that the breach of trust, if any, had been committed, except those who had themselves committed it while they were officers of the bank, and before the company was incorporated. Notice to the officer of one company in that capacity, is not notice to him as an officer of another company, and there was no notice here, and no right to follow these moneys: *Culhane v. Stuart*, 6 O. R. 97; *Taylor v. Blakelock*, 32 Ch. D. 560; *In re Marseilles Extension R. W. Co.*, L. R. 7 Ch. 161; *In re Carew's Estate Act*, 31 Beav. 39; Lindley's Company Law, pp. 204, 205; *In re Hennessy*, 2 Dr. & W. 555; *Denton v. Davies*, 18 Ves. 499. The bank's remedy, if any, is against its own directors: *In re European Bank*, L. R. 5 Ch. 358.

W. R. Meredith, Q.C., and *F. A. Hilton*, for the respondents. There was here clearly a breach of trust on the part of Blain, Allen and McDonald, and the persons injured by that breach of trust had a right to follow the moneys into the hands of those who took with notice of it. The breach of trust was committed before the incorporation of the company, and the partners in that company who got the benefit of the breach of trust must be held to have had notice of it. Clearly then before incorporation the bank would have been entitled to make a claim against the assets of the partnership, and against each partner individually, and these individuals could not by simply incorporating themselves, and assuming to transfer their assets to themselves as an incorporated body escape this liability: *In re Hallett's Estate*, 13 Ch. D. 696; *Harris v. Truman*, 7 Q. B. D. 240; *S. C.*, 9 Q. B. D. 264; *Francis*

v. *Francis*, 5 D. M. & G. 108; Lewin on Trusts, 8th ed., pp. 892, 894. The County Court Judge had power to decide this question of lien: R. S. O. (1887), ch. 183, sec. 34.

J. K. Kerr, Q.C., in reply.

May 13th, 1890. HAGARTY, C. J. O.:—

What was the nature of the interest acquired by the three new parties in the partnership assets? I do not see how it can be placed higher than an interest after payment of all the partnership debts, and such assets must properly be answerable for all such claims before the co-partners could derive benefit therefrom.

It is not easy to see how each new co-partner, as the owner of an undivided joint interest in specified proportions, could be held to have such a property in any of the chattels or assets as to be capable of so representing any portion of the money brought in by a partner as to be followed and charged with a lien for such moneys by a person not a creditor of the firm.

It is not necessary to discuss the principle that prevails between partners as to following moneys. This is fully stated in Lewin on Trusts, 8th ed., p. 894. If a surviving partner, being executor of a deceased partner, continue the testator's capital without authority in the trade, though the capital consists only of the stock and debts of the firm, and these undergo a continual course of change and fluctuation, yet the Court follows the trust capital throughout all its ramifications, and gives the deceased partner's estate the fruits derived from the capital so altered and changed.

Again, as between individuals, the trust money or property tortiously disposed of may be followed through all its changes of character, as exemplified in such cases as *Frith v. Cartland*, 2 H. & M. 417.

We have not been referred to any authority in point as to this peculiar case.

I am unable to see how the undivided joint interest in

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HAGARTY
C.J.O.

these assets can be liable to any enforceable lien to the prejudice of the creditors of the company.

But a very serious question was raised by Mr. Kerr for the appellants, although it was hardly, if at all, noticed by the respondent's counsel.

Was there any breach of trust shewn of which the parties in the Herr Company had notice?

It is not necessary either to discuss or to decide whether as between Blain, Allen, and McDonald and the Central Bank and its unfortunate shareholders, anything was committed amounting to a breach of trust.

The question before us seems to be whether, when these three persons formed the co-partnership with Herr, and Donaldson and Milne, the latter are shewn to be concerned in such breach so as to be affected thereby.

All the moneys brought into the business passed through McDonald's hands, and apparently always by his cheques on the Central Bank.

These payments were in various amounts, large and small, to discharge outstanding liabilities of the firm, into which he and his friends were entering. These payments, ranging over seven or eight months, were for wages, expenses and existing liabilities, and the money so paid was apparently to represent the stock they had agreed to take in the concern.

The old members of the firm may be held to have known that the moneys disbursed through McDonald came from the Central Bank, and it is most likely that they knew that Blain was president, Allen cashier, and McDonald a director. But there is no evidence to found the belief that they had any knowledge whatever of any improper dealings between these three parties and the bank, nor as to the state of their respective accounts.

I cannot see how any person dealing with any of them singly, or with the three jointly, should be held to be prejudiced or affected in receiving payments from them for property purchased by the fact of any of their accounts being overdrawn. The fact that they were officers of a

bank then in fair credit may have rather favoured the idea of their having the command of money for trade or investment.

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HAGARTY
C. J. O.

The three old partners remained from early in March to some time after the incorporation about August, when Donaldson and Milne sold out to McDonald. Herr appears to have remained to the end when the company went into liquidation in February.

If a breach of trust was committed when did it first occur? It could hardly be seriously claimed that it was from the beginning, because McDonald's account was then considerably overdrawn. But if a month or a week later his account was paid up are we to consider that such payment cured the default? And so on varying with the state of the account.

I think we would be establishing a most dangerous principle if we held the facts before us constituted such a breach of trust as would enable the bank to follow the money due them to the necessary prejudice of the creditors of the company.

I look upon the case as not shewing any originally fraudulent purpose in forming this co-partnership. It was under the expectation of its being a profitable investment. The drying up of the source of supply for these three persons, consequent on the failure of the Central Bank, caused the collapse of the company.

The case exhibits a most reckless dissipation of the unlucky shareholders' money by its trusted agents, but I cannot see how the assets of the piano company can be applied as sought by the respondents.

As to the stock in the company, as it is said to be worthless, it is hardly necessary to make any order respecting it.

I think the judgment below must be varied.

BURTON, J. A. :—

I think the first objection raised in the reasons of the appeal, is well taken, and that the learned Judge had no

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BURTON
J.A.

jurisdiction upon this interpleader issue to decide that the plaintiffs were or were not entitled to a lien or charge on the assets of the piano company.

There was no contest as to the \$2,552.82, for which the bank was held entitled to rank upon the estate; and the only question was as to a sum of \$21,954.64, of which Mr. Meredith admitted in the course of the trial that the sum of \$6,934.64, paid for the Donaldson and Milne stock, could not be proved as a claim on the estate, reducing the claim therefore to \$15,000.

It was as to this \$15,000 that the right of the bank to rank on the estate was confined at the trial, and upon the learned Judge finding, as he could not have done otherwise than find, that the bank had no right to rank as creditors in the winding up, the issue as to the claims should have been decided in favour of the appellant.

I have a very decided opinion upon the question on which the learned Judge gave judgment, but as the liquidators may possibly be advised to test that question in a proper proceeding, I refrain from any expression of that opinion, and content myself with saying that upon the issue as framed the judgment should have been in favour of the piano company, and the appeal therefore should be allowed.

OSLER, J. A.:—

The question upon which the judgment below turns was not before the learned Judge for decision. The whole question was whether the bank were creditors of the piano company, and this as to the particular sum in dispute was not proved. On that ground at all events the appeal should be allowed.

MACLENNAN, J. A.:—

I also am of opinion that this appeal must be allowed.

It is alleged by the Central Bank, that McDonald being a director of the bank, by the fraud of himself and Allen,

who was the bank cashier, drew from the bank all the money which he paid in to the partnership, between the 19th of March and the 5th of August; and that under the circumstances they are entitled to a lien upon 60-81 of the original assets of the Herr Piano Company, ascertained to be in possession of the company on the 11th of February, 1888, and the learned Judge has decided that they are so entitled.

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MACLENNAN
J.A.

The ground upon which the learned Judge rests his judgment is, that the money paid in by McDonald was money of the bank tortiously invested in the said assets by the three persons—namely, Blain, Allen, and McDonald,—occupying a fiduciary position towards the bank, and which assets the company acquired with full notice of the breach of trust committed by those persons towards the bank, and which the company therefore took subject to the bank's rightful charge thereon for the amount of the advance.

With great respect, I think the learned Judge has fallen into several errors. There is no evidence of notice to Herr, Donaldson and Milne of any fraud or irregularity on the part of the new partners in procuring the money which they paid, or which McDonald paid for them, as the consideration for their interest in the concern. Until after all that money was paid, and until the failure of the bank, McDonald and Blain and Allen were persons in undoubted credit. It is true that in general notice to one partner is constructive notice to the others. If one partner obtains money or property for the firm, by fraud or breach of trust, all are affected and must answer on the principle of agency, whether they knew of the fraud or not. But I know of no rule which affects A. and B., who take a new partner into their business, in consideration of his bringing in a sum of money agreed upon as his share of the capital of the new concern, with constructive notice of the means by which he acquired the money which he so brought in. Such a transaction is not a joint transaction at all, it is not a transaction of the firm. There is no agency in-

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MACLENNAN
J. A.

volved in it, and the other partners are not affected. The money when paid becomes the money of the firm, but it was not obtained for the firm. He obtained it for himself, and having done so he deals with the other persons, not with the firm, for a valuable consideration. It is clear, therefore, in my opinion, that if the money paid by McDonald was obtained by fraud or breach of trust, the other partners were not affected by it. The bank could only follow what the guilty parties obtained with it. The bank clearly could not stand higher than McDonald, Blain, and Allen. The very utmost they could claim would be to stand in the place of McDonald, Blain, and Allen in the concern, as if they had obtained an assignment of their interests in the firm. If that had been done, their right would have been to have the partnership wound up, the assets sold, the debts paid, and to have had their share of the surplus. They could have maintained no direct lien upon any undivided share of the firm's assets, but only subject to the payment of the debts. That would have been their right if the joint stock company had never been formed.

I find on careful examination that the \$15,000 which is sought to be followed by the bank was all paid during the partnership period of the business, and before it was transferred to the joint stock company on the 5th of August, so that the right of the bank, if any, arose during that period. The provisional directors named in the charter were McDonald, Blain, Allen and Donaldson. As I have shewn, Donaldson had no notice of any wrong, or of any claim of the bank, if they had any, and notice to one director is not notice to the others, or to the company: *In re Carew's Estate Act*, 31 Beav. 39; *In re Marseilles Extension R. W. Co.*, L. R. 7 Ch. 161; *Lindley's Law of Companies*, pp. 156, 204. Therefore I think the learned Judge was wrong in his conclusion that when the company obtained a transfer of the business and assets it had any notice of the bank's claim or lien. On the contrary, I think the company was formed, and the partnership busi-

ness and assets were transferred to it, without any such notice, actual or constructive.

Judgment.

MACLENNAN
J.A.

Then what was the effect of that transaction, if we suppose that previously the bank had a lien upon the interests of Blain, Allen and McDonald in the partnership?

All the partners had petitioned for the charter, saying they had taken shares, and that they were to be paid up shares, paid up by means of the transfer of property. The charter itself confirmed that, and on the 5th of August the assets were assigned to the company, in consideration of the paid up shares, and the assumption by the company of the existing liabilities.

The company obtained the assets of the partnership for valuable consideration without notice. The company became the owner of the assets, and the partners obtained paid up shares in lieu thereof; that is what by the terms of the transfer they were to get for their respective interests, and if the bank had any lien, it ceased in my opinion to be a lien upon the goods and assets of the partnership, when they passed to the company, and never was a lien upon the company's assets, or any part or proportion of them. If the lien still exists it can only be upon what Blain, Allen and McDonald obtained in consideration of the transfer to the company, viz., the shares, but whether it does or not we have no right here to express an opinion. It is enough to say, what I think is the proper conclusion, that the bank has not any lien for the money in question upon the assets of the Herr Piano Company.

Appeal allowed with costs.

TOWNSHIP OF BARTON V. CITY OF HAMILTON.

Municipal corporations—Extending sewer through contiguous municipality—“Territory”—R. S. O. (1887) ch. 184, sec. 492, sub-sec. 2.

The “territory” of the municipality referred to in R. S. O. (1887), ch. 184, sec. 492, sub-sec. 2, is the land comprised within the bounds, and under the jurisdiction of, the municipality, and is not limited to lands that are the property of the municipality.

One municipality cannot therefore extend a sewer through lands within the bounds of a contiguous municipality, without the consent of the latter, or without taking the statutory steps, even although the lands through which the sewer is to run have been purchased by the former municipality from the private owners.

Judgment of the Chancery Division, 18 O. R. 199, affirmed, BURTON, J. A., dissenting.

Statement.

THIS was an appeal from the judgment of the Chancery Division, reported 18 O. R. 199.

The plaintiffs were the municipal corporation of the township of Barton, that being a township in the county of Wentworth, immediately adjoining the city of Hamilton on the east side thereof. The action was brought to restrain the defendants from extending a sewer through a certain portion of the territory within the limits of the municipality of the plaintiffs.

It appeared that the defendants in the year 1879 had constructed, for the purpose of draining the eastern portion of the city of Hamilton, a sewer which emptied into an inlet of Burlington Bay in the township of Barton. The sewage flowed across the lands of one John Duffy, in the township of Barton, and Duffy obtained an injunction restraining the defendants from discharging the sewage upon his lands. The defendants then decided to construct a new outlet for the sewer for the purpose of carrying the sewage into deeper water in the same inlet, and before entering upon the work they obtained leave from the individual owners of the land through which the sewer was to pass, and paid them compensation. They did not, however, take any steps to obtain the consent of the plaintiff municipality before entering upon the construction of the sewer.

The action was tried before PROUDFOOT, J., at Hamilton, *Statement.* at the Spring Sittings of 1889, and the action was dismissed with costs, the learned Judge being of opinion that the defendants had the right to go outside the limits of their own municipality, and to take private property for the purposes of the corporation, having made due compensation to the private owners, and that the plaintiffs had no right to interfere. Upon appeal, however, this judgment was reversed by the Chancery Division, that Court being of opinion that before entering upon any land within the limits of another municipality, the municipality desiring to exercise the right must obtain consent, or take proceedings by arbitration as provided in the Municipal Act, and that the purchase from the private owners of the lands through which the sewer was to pass was not sufficient.

From this judgment the defendants appealed, and the appeal came on to be heard before this Court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ. A.) on the 25th and 26th of March, 1890.

Moss, Q.C., and MacKelcan, Q.C., for the appellants. The defendants having acquired from the owners the right to build through their lands in the township of Barton the sewer in question, cannot be interfered with by the plaintiffs in the prosecution of the work. The plaintiffs' rights over private property within their municipality do not extend so far as to permit them to dictate the uses to which such property shall be put. If any public nuisance were created upon private property its continuance could be restrained, but the defendants are not committing a nuisance, and even if they were in an action framed as this is relief could not be had. Under sub-section 1 of section 492 of the Municipal Act, an arbitration is only necessary where one municipality desires to unite or connect its sewers with those of a contiguous municipality. The arbitrators are to determine the conditions upon which such connection shall be made, and under sub-section 2 they are authorized to determine whether the connection

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or extension should be permitted at all. But these provisions can have no application where the terms and conditions have been settled with the private owners of the property. The right to enter upon and take land in an adjoining municipality for the purpose of providing an outlet for a sewer was given by section 20 of the Municipal Amendment Act of 1888, amending sub-section 15 of section 479 of the Municipal Act, R. S. O. (1887) ch. 184. The restrictions referred to in this sub-section upon the right of a corporation to enter upon and take land for the opening of a sewer were contained in section 483, and related to the making of due compensation for any damages necessarily resulting from the exercise of such powers. No additional restrictions are imported into sub-section 15 of section 479 by the amending Act. Section 492 never was applicable to a case under sub-section 15 of section 479, and it was not made applicable by the amendment. The defendants have not trespassed upon nor taken any territory or property of the plaintiffs, nor have they created any public nuisance. Clearly if what they have done had been done by private individuals or a railway or a commercial corporation, the plaintiffs could not interfere, and the fact that the defendants are a municipal corporation gives the plaintiffs no higher right as against them than they would have against any other corporation or persons. A corporation created by law is not confined in its existence to any particular locality but as a corporate body it exists wherever it does any act, makes any contract, acquires any property, or does by its agents what an individual could do if personally present. There is no law or statutory enactment which prohibits one municipality from acquiring land within the boundaries of another. If the private owners of the land built a sewer and allowed the defendants to use it the plaintiffs could not interfere and they have no higher right now.

See *National Bank v. Matthews*, 98 U. S. 621; *Cowell v. Springs Co.*, 100 U. S. 55; *Christian Union v. Young*, 101 U. S. 352; *Missouri Valley Co. v. Bushnell*, 8 Am. Cor. Cas.

332; *Chambers v. City of St. Louis*, 29 Mo. 543; Green's Argument. Brice on *Ultra Vires*, pp. 11 to 14; Dillon on Corporations, 3rd ed., sec. 446; *Harding v. Cardiff*, 29 Gr. 308; *Pratt v. Stratford*, 14 O. R. 260; S. C. 16 A. R. 5; *Salvin v. North Brancepeth Coal Co.*, L. R. 9 Ch. 705; *Earl of Ripon v. Hobart*, 3 My. & K. 169.

S. H. Blake, Q. C., and *W. Bell*, for the respondents. The right to expropriate the lands of private owners for the purpose of a sewer is separate and distinct from the right of one municipality to extend its sewers into the territory of an adjoining municipality, and the plaintiffs are entitled to restrain the defendants from extending a sewer into their territory without their consent. Section 492 clearly applies to a case like the present, and it does not apply to disputes with private owners through whose lands a sewer may pass. The terms and conditions referred to have reference to the mode of constructing the sewer and the place of discharge, provided the arbitrators decide in the first place that there is a right of extension at all. Without consent or without the award of the arbitrators one municipality has no right whatever to enter upon the territory of another. Territory does not mean land actually owned by the municipality, but must mean land over which the municipality has control, and which is embraced within its territorial limits. The defendants have entered upon the plaintiffs' territory in that sense. Before the Municipal Amendment Act of 1888, a municipality had no right to expropriate the lands of private owners in an adjoining municipality, even after the municipality had obtained the right to extend their sewer into the territory of the adjoining municipality by agreement or arbitration as provided in the Act. The amendment only provides for the right to expropriate the lands of private owners in the adjoining municipality, but does not touch the question as between the two municipalities, which is separately and distinctly provided for by section 492. Under sub-section 2 of that section, if the municipality through whose territory the sewer is sought

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to be extended objects to such extension, the question of the right to extend the sewer is first to be determined, and until that right is determined, the extension of the sewer is a trespass. The plaintiffs do not claim any right to prevent the defendants from acquiring from the private owners thereof any lands they may choose, but this is not in any way connected with their right to extend their sewer through the territory of the plaintiffs. The construction and management of sewers come within the jurisdiction of the municipal councils, and it is intended by the Legislature that each municipality shall have exclusive control and management of such sewers as are within their territorial jurisdiction. If one municipality were allowed to extend its sewers into the territory of an adjoining municipality without observing the provisions of the Municipal Act in that behalf, it might seriously interfere with the system of sewers in such adjoining municipality.

See *Fenelon Falls v. Victoria R. W. Co.*, 29 Gr. 4; *Devonport v. Plymouth, etc. Co.* 52 L. T. N. S. 161; *Coldwater v. Tucker*, 36 Mich. 474; *Hill v. Metropolitan Asylum District*, 4 Q. B. D. 433; *Attorney-General v. Colney Hatch Lunatic Asylum*, L. R. 4 Ch. 146; *Elizabethtown v. Brockville*, 10 O. R. 372.

Moss, Q. C., in reply.

May 13th, 1890. OSLER, J.A.:—

But for the amendment made by 51 Vic. ch. 28, sec. 20, in section 479, sub-section 15, of the Municipal Act, I should not have thought there could be any reasonable doubt of the right of the plaintiffs to maintain this action; not for the purpose of restraining a nuisance, and the case has not been put upon that ground, but upon the ground that by section 492, the power of one municipality to extend its sewer into a contiguous municipality, is dependent in the first place upon the latter's consent, and failing that, or to speak more accurately, where the extension is ob-

jected to, upon an award under the Act permitting such extension, and defining the terms and conditions upon which it shall be allowed, and that in the present case no such permission has been given by the plaintiffs, but they have on the contrary objected to the extension, and no award has been made allowing it under the provisions of the Act: *Devonport v. Plymouth, &c. Co.*, 52 L. T. N. S. 161.

Judgment.

 OSLER
J.A.

I will consider for a moment the rights of two adjoining municipalities as governed by the statute law prior to the recent amendment.

The general rule for the exercise of their powers by municipal corporations is that given by section 282 [R. S. O. (1887) ch. 184] which enacts that the jurisdiction of every council shall be confined to the municipality the council represents, except where authority beyond the same has been expressly given.

In section 479, sub-section 22 ; section 489, sub-sections 11 and 57, power is given to one municipality to acquire lands in an adjoining one for the purpose of parks, cemeteries, and "for the public use of the municipality." No consent is required on the part of the servient municipality to the action of the other for these purposes ; and while land may be taken compulsorily for park purposes, and perhaps for other "public uses of the municipality:" under sub-section 57, other purposes, the subjects of special enactments, must be carried out by agreement with the owners of the land required to be taken.

The defendants did not attempt to support these proceedings under sub-section 57, and no doubt it is in the special enactments on this subject that their authority, if it existed, must be discovered.

This leads us to section 492, the origin of which is 48 Vic. ch. 39, sec. 39, and the powers conferred by which must be carefully noted.

In case a township, city, town, or village (counties not being concerned) shall be so situated that in the construction of any sewer therein it becomes necessary in order to

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provide an outlet to extend the same into or through a contiguous municipality, such township, city, &c., shall be permitted and have power, subject as hereinafter provided (a) to so extend the sewer, and (b) shall be permitted and have power to unite and connect the same to any existing sewer of such contiguous municipality upon such terms and conditions as shall be agreed upon between the respective municipalities, and failing an agreement then upon such terms and conditions as shall be determined by arbitration.

I am not satisfied that this sub-section (1), taken by itself, confers any power to acquire lands compulsorily. The exercise of the power to extend, or make connection, seems to depend upon an agreement being made between the municipalities concerned as to terms and conditions, and if the extension is to be made through private property, it would seem further to depend upon the ability of the municipality to acquire such property from the owners in the servient municipality. I do not, however, regard this as essential to the argument.

Then sub-section 2 provides that in any case where the council *objects to allow* an adjoining municipality to connect with an *existing sewer*, or to extend a sewer through its territory *as above provided*, i. e., in sub-section (1), [the omission of the word *into* seems therefore to be without significance], *then* the arbitrators shall determine, not merely the terms and conditions on which the connection or extension shall be allowed to be made, but whether it shall be allowed to be made at all.

So that if the council of the servient municipality object to the extension being made through its territory, and the arbitrators do not award that it may be so made, the permission and power to extend or connect it do not exist, for sub-section (1) only confers it "subject as thereafter provided."

I agree with the learned Chancellor in thinking that the word "territory" means the area of the municipality, and not the highways, or roads, or property, acquired or used

for corporate purposes. Territory is not an apt word to describe the roads or corporate property of a municipality, and is never, that I am aware of, used in that sense in the Municipal Acts.

Judgment.

OSLER
J.A.

As used in sub-section 2 of section 492, it evidently means the contiguous municipality mentioned in sub-section 1, as may be seen by comparing the territory described in one with that in the other. In sub-section 1 we have: "In case it becomes necessary to extend the same into, or through a contiguous municipality;" and in sub-section 2: "In any case where the council of any municipality shall object to allow an adjoining municipality * * to extend a sewer through its territory."

If there is nothing in sub-section 1 to limit the meaning of the expression "contiguous municipality," there is no reason to put a forced construction on the word "territory" in sub-section 2, for the things referred to are one and the same.

It has been asked what concern it is of the servient municipality that another should construct a sewer through its territory (in the sense I give to that word) where the sewer is built in private property acquired by the latter, and does not affect its roads or other corporate property? In other words, whether one municipal corporation, as regards buying land for drainage or sewerage purposes in the territory of another, is not in as good a position as a private person? It might be sufficient to answer that the Legislature has in fact imposed conditions upon the exercise of such power, and in the case of the extension of drains or sewers into a foreign municipality, as distinguished from the exercise of other powers to acquire land therein, that appears to be the policy of the Legislature, for in the analogous case provided for by section 496, sub-section 35, we find that a city, town, or incorporated village may pass by-laws for accepting or purchasing land in any other municipality which may be required for preventing such city, town, &c., from being flooded by water flowing from such other municipality into such city, town, &c., and for providing an outlet

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OSLER

J.A.

for such waters, &c., and for opening, making, &c., drains or sewers on the lands so acquired; Provided always that the consent of the municipality in which the lands to be taken are situate shall be obtained before the powers conferred by this section are exercised. The language of section 492 is not less strong as to the conditional nature of the power conferred by that section. We thus have special limitations relating to the acquisition of lands for the purpose of drainage or sewerage, while for other purposes the power to acquire land outside the limits of the municipality for its public uses, seems to be unfettered.

It is to be observed that not only may a city exercise the powers mentioned in section 492 in a township territory, but the township has a corresponding right to do so in the territory of the city, and while the section must receive the same construction in each case, the propriety and necessity of a consent in the latter is more obvious.

Proceeding now to the amendment introduced by the recent Act into section 479 (15):—That clause as it stood in the R. S. O. (1887), at the time of the amendment, is found in the Act of 1866 and other subsequent consolidations of the Municipal Act. The powers conferred by it were to be exercised within the territorial limits of the municipality, and the restrictions referred to were probably those relating to the compulsory acquirement of private property. As amended the clause now enables the council to pass a by-law for taking land “in or adjacent to” the municipality, necessary or convenient for the purposes of opening, making, preserving, improving, repairing, widening, altering, diverting, stopping up, and pulling down, drains, sewers, and watercourses within its jurisdiction, or for entering upon, taking or using any land “not adjacent to” the municipality, for the purpose of providing an outlet for any sewer “but subject always to the restrictions in this Act contained.”

This section must now be read in connection with sections 492, and 496, sub-section 35, and the amendment may have been, and probably was, passed for the very purpose of

enabling the council to take lands compulsorily in cases where those sections are intended to be acted upon. The restrictive clause applies to all the powers conferred by the section ; and when we find in the Act sections 492, and 496 sub-section 35, giving the right to enter upon the territory of another municipality for drainage and sewerage purposes, subjected to certain restrictions, it appears to me we must necessarily read section 479, sub-section 15, as amended, as subjecting the powers thereby conferred, not only to the restrictions imposed by section 483, as to compensation, but also to those found in sections 496 (35) and 492, as to the consent of the servient municipality. If this was not the intention of the Legislature the operation of section 492 becomes limited to the connecting of a sewer in one municipality to that in a contiguous one, or the extending of it through the roads of the latter, and the right to extend a sewer in any other way through the territory of the latter would become wholly dependent upon section 479, sub-section 15. But as section 492 cannot in my humble judgment be so construed as to give this limited meaning to the word territory, the restrictions imposed thereby remain and must be observed by a municipality which is desirous of exercising the powers thereby conferred within the limits of another.

I am therefore of opinion that the appeal should be dismissed.

MACLENNAN, J.A. :—

I am of opinion that the judgment appealed from is right, and ought to be affirmed.

By section 479 (15) as it stood before the year 1887, counties, townships, cities, towns and incorporated villages, might pass by-laws for making sewers, and for entering upon and taking any land necessary for the purpose.

By section 282 their powers were confined within the corporate limits of the municipality, and by section 483 they were to make compensation to all persons for damage.

Judgment.

OSLER
J.A.

Judgment. If the corporation desired to extend a sewer beyond the
MACLENNAN corporate boundary it had to proceed under the authority
J.A. and subject to the restrictions and qualifications expressed
in section 492 (1), (2).

Such an extension could only be made subject to such terms and conditions as might be agreed upon with the adjoining municipality, or in case of a difference, as might be settled by arbitration, and in case the adjacent municipality objected to the extension altogether, then the power to extend was to be subject to arbitration.

I incline to think that under the section 492 a municipality could take lands compulsorily. It says it (the municipality) "shall be permitted, and have the power" to extend the sewer into or through the contiguous municipality, subject only to the terms and conditions being settled with the adjoining municipality. The moment those terms and conditions were settled, then I think they could enter upon and take the lands which were required, making due compensation to the owners, as in cases within their own corporate limits.

That was the state of the law, as I think, when in 1887, by 50 Vic. ch. 29, sec. 25, what is now section 489 (57) was passed. That amendment gave townships, cities, towns, and incorporated villages, a new power. It enabled them to acquire and hold by purchase or otherwise lands outside the corporate limits for the public uses of the municipality. It is not necessary to decide whether under this section they could take lands compulsorily or not, but what is remarkable is that there is no mention of any consent being required of the neighbouring municipality. If the council requires land outside its own corporate limits, for any public purpose, and if it can acquire it either by gift, purchase, or otherwise from the owners, it may do so without asking or obtaining any leave from the outside municipality.

This new section is wide enough in its terms to include the case of extending a sewer. The word land is by the interpretation clause of the Municipal Act declared to

include any interest therein, and would therefore include the easement or privilege of constructing a sewer.

Judgment.

MACLENNAN
J.A.

But when this section was introduced into the Act, the old section 492 was not altered, but was allowed to stand as before, and both sections were included in the revision, and re-enacted in chapter 184 of the Revised Statutes of 1887. We must therefore construe them, and give due effect to both of them, as we find them in the Act.

When these three sections 479 (15), 489 (57), and 492 (1) (2), are read together, as they must be, I think the only construction they admit of is, that while as a general rule a council may acquire and hold land situate outside of its corporate limits for the public uses of the municipality, without any interference from the adjacent municipality, and without its consent, there is an exception in the case of extending a sewer beyond the limits, and that every case of that kind is governed by the provisions of section 492.

It was argued that the terms and conditions mentioned in this section applied only when it was desired to extend a sewer so as to connect it with one already constructed in the other municipality; and it was also contended that the territory mentioned in section 492 (2) meant the corporate property of the municipality. I am unable to accede to either of these contentions. I think the language used by the Legislature is clear and plain, that in no case can a sewer be extended into an adjacent municipality, whether for the purpose of connection with another sewer or not, without either agreement or arbitration with the other municipality, as to whether, and if so, upon what terms and conditions, the extension or connection shall be permitted.

The Legislature seems to have thought that the extension by one municipality of a sewer into or through the territory of another, meaning by that, not its corporate property, but the territory over which its municipal authority extends, may be a very serious matter for what may be called the servient municipality, and one upon which it ought to be

Judgment.
MACLENNAN
J.A.

consulted, and to which it ought to have the power of objecting, and of having the judgment of arbitrators whether it should be permitted, or if permitted upon what terms or conditions.

In some cases it might be a matter of no moment, and I do not see what great objection there could be in the present case, but in other cases it might be a very serious consideration, as if for example Yorkville had, before incorporation with the city, proposed to run a main sewer through the centre of Toronto regardless, it might be, of convenience and important public interests.

It was, however, contended that the amendment of section 479 (15) enacted by 51 Vic. ch. 28, sec. 20, removed the restriction arising from section 492, and that since that amendment it was no longer necessary to consult the adjacent municipality.

I do not think the amendment has that effect. In my judgment its only effect is, that whereas the old sub-section 15 gave no authority without the consent of the owners to take or enter lands beyond the corporate limits, for making or improving drains, sewers or watercourses, that authority is now given by the amendment. It does not profess to interfere with section 492, but leaves it as it was, and it provides that this new power, as well as the old, shall be exercised subject to the "restrictions in this Act contained."

I think section 492 is as plainly as any thing can be a restriction upon the power of a council to open or make a sewer in or through land in an adjacent municipality, and that section 483, providing for compensation, is therefore not, as was contended, the only restriction upon the powers conferred by the amended section.

I therefore think that the city of Hamilton was wrong in proceeding with the sewer in the face of the objection from the plaintiffs' solicitor of the 1st of September, 1888, and that the appeal should be dismissed, and with costs.

HAGARTY, C. J. O., concurred.

BURTON, J. A. :—

Judgment.

BURTON
J.A.

The question in this case depends upon the proper construction to be placed on the words "subject to the restrictions in this Act contained," to be found in sub-section 15 of section 479 of the Municipal Act, whether they are to be read as they always were read previous to the amendments in 1888, as applying to the compensation to be paid for the land taken or injuriously affected, or whether that section is overridden and controlled by section 492, so that in the absence of a consent on the part of the township of Barton the defendants were precluded from doing what they have done in building a sewer, even upon their own property.

In order to determine whether that is the proper construction, it may be convenient to trace the history of the legislation affecting this question, and I may say at once that I quite agree with the Court below, and with Mr. Blake's contention, that the jurisdiction of each municipal corporation is strictly confined within its own limits except in those cases where authority is expressly given to do something in another municipality, or, in other words, each corporation derives its authority from the statute alone.

The original of section 492 was first enacted in 1885. Previously to the passing of that Act one municipality had no authority, when it became desirable to procure an outlet for any sewer within its limits, to extend its operations into a contiguous municipality. That section enabled it to do so with the consent of the other municipality, and in the event of such consent being refused gave the municipality desiring such extension power to appeal to arbitrators who had authority to determine whether such permission should be given, and if so upon what terms and conditions.

If the council of the adjoining municipality consented, and the extension was to be through its own lands nothing further was required, but it might be even in such a case necessary in order to extend the sewer to go through

Judgment.
BURTON
J.A.

private lands, and no power to acquire such lands compulsorily existed prior to the amendment made in 1888 to sub-section 15 of section 479, although in the previous year power had been given to acquire and hold such lands by purchase.

That section as found in the R. S. O. before the amendment, was a transcript of the original enactment to be found in the Municipal Acts so far back at least as 1866, if not before, dealing with the right to expropriate for the purpose of sewers, and has been continued throughout the several consolidations and revisions down to 1888, and was before that time confined to the same objects within the confines of the municipality, and was always subject to the restrictions contained in the Municipal Act, that is to say to the right of the party whose property was taken or affected to receive compensation.

If when this amendment was made section 492 had not been in the Act, it is clear that the words "subject to the restrictions," &c., must have received the same construction they had always received as applying to taking lands or exercising other powers compulsorily, and to nothing else. In other words the effect of the amendment would have been nothing more than this—whilst we have heretofore allowed you to take lands compulsorily for these purposes within your own limits, making compensation to the owners or persons affected, we extend that power to lands in another municipality, but on the same condition of compensating the owners.

The city could have acquired compulsorily or by purchase any lands from private individuals, and if they could find an outlet for these drains through that private property without touching any roads or property of the township the statute gave them full authority to do so, and the township could not have interfered.

The city would own the property with full power to do what it liked with it, and if it could make a sewer over or through it without in any way interfering with township property, there would seem to be no plausible ground for their not being permitted to do so.

The only pretext for placing a different construction upon the words to be found in section 479, "subject to the restrictions in this Act contained," from what they have always before received, arises from the fact that section 492 was passed before the amendment, and so it is contended this is a further restriction beyond that contained in section 479 when originally passed. But to place such a construction upon it, it must be clear that these two sections are dealing with precisely the same subject matter.

I think with great respect that section 492 is dealing only with the case of the extension of a sewer through the lands or property of the township. That such was the view of the Legislature is, I think, clear from their deeming it necessary to give express power subsequently to take private lands; so that if in addition to taking public property it was necessary also to take private lands, it was necessary to obtain both the consent of the owner and of the township; if public lands only, then the consent of the township, and if private lands only, the consent of the owner.

If a contrary construction were to prevail, let us consider what extraordinary results might follow.

It might be that no proper outlet to the city sewer might be obtained without passing for several miles through the township of Saltfleet, the next township to Barton; we will assume, for the sake of argument, that the consent of Saltfleet had been obtained, and that it was not necessary to encroach upon any but private lands in Barton, so that a covered sewer would be built in the township of Barton through private lands, and the outlet would be some miles from its limits in the township of Saltfleet. According to the contention of these plaintiffs this could not be done without the consent of Barton, which could not by possibility be affected by the works. Granting to the fullest extent "that one municipality should not invade the territory or interfere with the concerns of another without the consent of the latter," how would the territory of these plaintiffs be invaded in such a case by the owner of the

Judgment.

BURTON
J.A.

Judgment.

BURTON
J.A.

land doing something which he had an undoubted right to do upon his own property, and which would not interfere with any rights or property of the township?

Sections 479 and 492, appear to me, with great respect, to deal with subjects which are wholly distinct; the former is to enable the municipality to expropriate the lands of private individuals, and properly provides for their compensation; the other deals with the interests of the township, and provides that those interests shall not be interfered with except with their consent.

No property of the township is interfered with by what the city had done at the time this action was commenced, or by what it professes to do; it has built a sewer on private property, and it proposes to discharge the sewer upon private property, such private property being covered with water, and without any objection from the proprietor.

The learned counsel referred to sub-section 35 of section 496, in support of his contention, but I do not think it aids him. Granting the general policy of the law that the powers of a municipal corporation are, in the absence of express enactments, confined within the limits of their municipality, we have to refer to each exception to ascertain to what extent, and subject to what restrictions, they can exercise these exceptional powers.

The case dealt with by that particular section is the case of surface water accumulating on land in one municipality and flowing from it into another.

I apprehend that no consent would be required from the municipality in which the lands are situate to enable the other municipality to purchase or acquire the flooded lands, but they are further empowered after their acquisition, in order to provide an outlet, to make sewers through that or any other municipality, but before the exercise of these powers the consent of the municipality in which the lands are situate is required.

It must be manifest that if the outlet could be obtained through the city's own territory no such consent would be necessary, but a curious oversight has occurred in this

section which, though authorizing the outlet to be made through any other municipality, limits the consent to the township or municipality in which the lands are situate.

Judgment.

BURTON
J.A.

Sub-section 11 of section 489 was also referred to and merely emphasizes what I have already said as to the necessity of ascertaining the right of the municipality from the actual language employed. In this section, which deals with cemeteries, the one municipality has the right without any consent to purchase lands in an adjoining municipality for such a purpose, and thereupon the land so acquired becomes detached and forms part of the acquiring municipality.

It would be an extraordinary interference with the rights of private property to place the construction contended for on these words, whereas the interests of the township are amply safe-guarded by placing the construction upon section 492, which my brother Proudfoot, I think properly, placed upon it.

The case referred to in the judgment, and cited in argument by Mr. Blake of *Devonport v. Plymouth, &c., Co.*, 52 L. T. N. S. 161, does not at all support the plaintiffs' contention in my opinion. The defendants there had obtained an Act of Parliament for making a tramway, in which the respective boroughs of Plymouth and Devonport were interested, and the Act provided that the company should not, without the consent of the corporations of both boroughs, open any portion of the line for traffic until the whole was completed, so that the same might be simultaneously opened for public traffic. A portion having been completed in one borough, they attempted to run it without the consent of the other, and upon the application of that borough an injunction was granted. A very plain case I should say for interference, and I quite concede that it would be so here if it can be held that section 492 extends to private lands acquired by the city upon which works are built which do not, and cannot, interfere with property of the township.

For these reasons I am of opinion that the case is not within section 492.

Judgment.

BURTON

J.A.

The plaintiffs were not in a position to maintain an action in the nature of a *quia timet* action.

Even if a case of actual nuisance had been established no property of the plaintiffs would have been affected, and they would not have been entitled to take proceedings in their own name, but here there was no evidence of an actual nuisance committed, nor evidence of imminent danger of a nuisance of a substantial character to any property of these plaintiffs.

Should the flow of this sewage at any time become a public nuisance, the parties interested will not be without remedy.

I think the appeal should be allowed, and the action dismissed.

Appeal dismissed with costs,
BURTON, J.A., *dissenting.*

BRADY V. SADLER.

Crown Patent—Reservation—Evidence.

The description of lands conveyed by a Crown Patent was "all that parcel of land containing by admeasurement sixty acres, be the same more or less, being composed of lot number nine, exclusive of the lands covered by the waters of the S. River."

Lot nine included, by metes and bounds, two hundred acres, but the S. River ran through it. At the time of, and for some time previous to, the issue of the patent the waters of the S. River at this place were penned back by a dam.

Held, that the words "the waters of the S. River" did not mean the waters of that river flowing in its natural channel merely, or the waters at the height at which they might happen to be on the day of the issue of the patent, but had the effect of reserving from the grant that portion of the lot liable to be covered, owing to the existence of the dam, by the waters of the river, at their natural height at any time during the ordinary changes of the seasons.

Held also, that extrinsic evidence was admissible for the purpose of explaining the language of this description, and that, upon that evidence, the land in question had not passed under the grant.

Judgment of the Queen's Bench Division, 16 O. R. 49, reversed.

THIS was an appeal from the judgment of the Queen's Statement. Bench Division, reported 16 O. R. 49.

The defendants carried on business as millers at the town of Lindsay, and were the owners of a large mill, power for which was supplied by the waters of the Scugog River.

At the mill there was a dam which had been erected by the Government of the late Province of Canada in the year 1843.

The plaintiffs were farmers, owning lands about fifteen miles from the dam, through which a branch of the Scugog River, known as East Cross Creek, flowed, and they complained that the defendants had wrongfully placed bracket boards on the dam and had thereby raised the waters of the river so as to flood certain portions of their lands, and they claimed an injunction.

The defendants claimed that they had a prescriptive right to use bracket boards upon the dam in question, and also set up the defence that the plaintiffs had acquired their lands after the building of the dam, and that under the provisions of the Mill Dam Act they could not recover any

Statement. damages. They also contended that the plaintiffs had no title to the portion of the land that was overflowed.

The Letters Patent from the Crown of the plaintiffs' land were issued on the 10th of January, 1852, and contained the following clauses :

Now know ye that in consideration of the said sum of Thirty-five pounds by him the said Michael Brady to our said Commissioner of Crown Lands, in hand well and truly paid to our use, at or before the sealing of these our Letters Patent, we have granted, sold, aliened, conveyed and assured, and by these Presents do grant, sell, alien, convey and assure unto the said Michael Brady, his heirs and assigns forever all that parcel or tract of land, situate, lying and being in the township of Ops, in the county of Victoria, in our said Province, containing by admeasurement 60 acres, be the same more or less ; which said parcel or tract of land may be otherwise known as follows, that is to say: being composed of lot number 9, in the 4th concession of the aforesaid township of Ops, exclusive of the lands covered by the waters of the Scugog River, which are hereby reserved, together with free access to the shore thereof for all vessels, boats and persons. To have and to hold the said parcel or tract of land hereby granted, conveyed, and assured, unto the said Michael Brady, his heirs and assigns for ever ; saving, excepting, and reserving, nevertheless, unto us, our heirs and successors, all mines of gold and silver, and the free uses, passage, and enjoyment of, in, over and upon all navigable waters that shall or may be hereafter found on or under, or be flowing through or upon any part of the said parcel or tract of land hereby granted as aforesaid.

The action was tried before PROUDFOOT, J., at Lindsay, and he dismissed it with costs, but upon appeal his judgment was reversed by the Divisional Court of the Queen's Bench Division.

The defendants appealed and the appeal came on to be *Argument.* heard before this Court (HAGARTY, C. J. O., GALT, C. J. C. P., BURTON, and OSLER, JJ.A.) on the 3rd and 5th of April, 1890.

E. Blake, Q.C., *S. H. Blake*, Q.C., and *T. Stewart*, for the appellants. In order to properly construe this patent it is necessary to look at the certificates and letters that passed between the parties at the time the patent was issued, and evidence is also admissible to show the circumstances and situation at the time of the grant so that it may be seen what actually was intended to pass under the patent. To do this is not a transgression of the rule that oral evidence is not to be admitted to vary a written document: *Cartwright v. Detlor*, 19 U. C. R. 210; *Stevens v. Buck*, 43 U. C. R. 1; *Re Trent Valley Canal*, 12 O. R. 153; *Herrick v. Sixby*, L. R. 1 P. C. 436; *Lord v. Commissioners of Sidney*, 12 Moo. P.C. 473; *Shore v. Wilson*, 9 Cl. & F. 355; *Iler v. Nolan*, 21 U. C. R. 309; *Lloyd v. Henderson*, 25 C. P. 253; *Grahame v. Brown*, 12 C. P. 418. The land covered by the waters of the Scugog is excluded, and that must mean all the land covered by the waters of the Scugog or its tributaries at ordinary high water mark: *Angell on Water Courses*, 7th ed., secs. 4, 41; *Parker v. Elliott*, 1 C. P. 470; *Plumb v. McGannon*, 32 U. C. R. 8. It is clear upon the evidence that the lands in respect of the flooding of which the complaint is now made, are covered by the waters of the Scugog in the ordinary season of high water, and that the use of bracket boards at the season of low water does not cause the waters of that river to reach a higher mark than they do without the boards in the ordinary season of high water, so that clearly the plaintiffs have no title and no right to recover.

Robinson, Q.C., *Moss*, Q.C., and *H. O'Leary*, for the respondents. The grant from the Crown to the plaintiffs is of the whole of lot number 9, with the exception or reservation of lands covered by the waters of the Scugog River, and the words of the exception must be construed in favour

Argument.

of the grantee: *Bullen v. Denning*,^{5 B. & C. 842.} Full meaning is given to the words of the exception or reservation by confining them to the waters of the river within its bed, and this is their ordinary and natural sense. The whole lot, subject to the exception of that part covered by the bed of the river, was bought and paid for, and the mere statement in the patent that sixty acres, more or less, are intended to be conveyed, does not limit the amount properly passing under the patent, if in fact there were more than sixty acres. The papers and documents from the Crown Lands Department were not properly admissible to control the effect of the patent.

E. Blake, Q.C., in reply.

(The learned counsel argued at great length the questions arising under the Mill Dam Act and under the Statute of Limitations, but it is not necessary, in view of the point upon which the decision turned, to notice these arguments.)

May 13th, 1890. GALT, C.J.C.P.:—

By the terms of the patent the grantee was to take "all that parcel or tract of land situate, lying and being in the township of Ops, containing by admeasurement 60 acres, be the same more or less, being composed of lot number 9, in the 4th concession of the township of Ops, exclusive of the lands covered by the waters of the Scugog River, which are hereby reserved, together with free access to the shore thereof for all vessels, boats and persons." This is not a grant of lot 9 in the 4th concession, but of 60 acres, more or less, of the lot, and is confined to the lands which were not covered by the waters of the Scugog River. It was therefore necessary that evidence should be given to ascertain what 60 acres had been granted.

Years before this patent was issued the dam at Lindsay, across the Scugog River had been constructed, and the lands which were reserved were, the lands which in conse-

quence thereof had been covered by the waters of the Scugog River. From the evidence it appeared that in the spring of the year water flowed over the dam at a depth of about two and a half feet, consequently the waters above the mill dam would be pressed back to that level. When the dry season came the waters in the river would fall to the height of the dam, and the supply being then insufficient, the defendants, and those through whom they claim, (with the permission of the government) were in the practice of putting "brackets" of about ten or twelve inches in height along the top of the dam. This would raise the water above the dam, but not to the height at which it flowed in the spring. When the patent was issued, and reservation made, the whole lot belonged to the Crown, and by the terms of the patent none of the land covered by the waters of the Scugog River were granted; it was the intention of the Crown to convey all the rest of the lands in lot 9, in the 4th concession, to the grantee, but not those reserved.

The reservation by the Crown of the lands mentioned should, it appears to me, in this case be ascertained in the same manner in which the rights of the Crown are regulated in what may be termed "tidal rights." These were very fully discussed in the *Attorney General v. Chambers*, 4 D. M. & G. 206, which was a very important case, and it was there decided "that the medium line must be treated as bounding the rights of the Crown," that is to say, the rights of the Crown were bounded not by the water line of exceptionally high tides, nor were they limited to neap tides, but were regulated by the average of medium tides. Apply this rule to the present case, and the reservation by the Crown would exclude from the patent all lands which in the ordinary spring floods are covered by water of the Scugog River. The lands now in question were so covered, and therefore the plaintiffs have no cause of action.

Judgment.

GALT
C.J.C.P.

Judgment. BURTON, J. A.:—

BURTON
J.A.

This case may I think be disposed of on the construction of the patent, and it will not be necessary in my view to deal with the defence of prescriptive right, or that arising under the Mill Dam Act, as to which there was some misapprehension in the Court below who seemed to consider that it had not been pleaded. This is manifestly a mistake, as the defendants had a right, under the Act, to plead the general issue by statute, which was done in proper form.

I quite agree that the contents of the writings previous to and leading to the issue of the patent cannot be referred to as enlarging or controlling the plain words of the patent itself, and can be used only for the purpose of reforming the instrument in the event of mistake with which we have nothing to do in the present proceeding.

I agree with the learned Chief Justice of the Queen's Bench Division that the same rules as to the admission of extrinsic evidence and as to the construction of written instruments apply equally to a grant from the Crown as to a deed from a subject, and I take his extract from Mr. Taylor's work as the starting point and the correct rule to be adopted in placing a construction upon this grant, and as it so tersely states that rule I again quote it here :

"It may be laid down as a broad and distinct rule of law that extrinsic evidence of every material fact which will enable the Court to ascertain the nature and qualities of the subject matter of the instrument, or in other words to identify the persons and things to which the instrument refers, must of necessity be received."

It must be borne in mind that the whole of lot 9 is not granted, subject to an easement or right to overflow it at certain times, or at all times, but so much only of that lot as was not covered by the waters of the Scugog River which was thereby reserved.

Here is at once an ambiguity calling for evidence. The reservation might mean, as the learned Judge suggests, the bed of the river itself, although that would be, as we all

know, in the case of non-navigable streams, a most unusual thing, as the customary course is to grant the whole lot, including the bed of the stream, or it might mean so much of the lot as was covered with water of the river raised by artificial means; and when we refer to the evidence we find that the waters had at that time been raised by means of a dam constructed by the Government itself for the purposes of navigation.

Judgment.

BURTON
J.A.

It is of course quite unimportant in what portion of the description the reference is made to the acreage, nor is it a very material portion of the description; the substance of it is, that that portion only of lot 9 was intended to be granted which was not covered by—not the Scugog River, but the waters of the Scugog River—the portion so granted being described as containing 60 acres more or less.

Now I quite concede that the plaintiff Michael Brady was not confined to 60 acres, and that if it had been found that 10 acres only of the 200 had been submerged, that the plaintiff would have been entitled to the 190 acres, although he had only paid for 60 by actual computation, at so much per acre, with £5 additional for his chance in the portion represented as worthless, but the quantity of land alleged to be granted is one of these facts and circumstances which may be looked at in coming to a conclusion as to what was intended by the grant.

We have in the first place the representation of the plaintiff, or some one acting for him, that in consequence of the position of Scugog River and East Cross Creek there are but 60 acres of dry land, and the surveyor who made the survey on which his petition was based, recommends that he be allowed to purchase at 10 shillings per acre, but as the rest of the land being either marshy or submerged was valueless, that that also should be included without further charge.

To this the Department refused to accede, and the 60 acres alone were paid for, although the patent did not issue at that time.

Things remained in this position between three and four

Judgment.

BURTON
J.A.

years, when an application was made on the plaintiff's behalf to purchase the remaining 140 acres, provided the surveyor's former valuation was accepted for the drowned land. This was not accepted in these terms, but the Crown Lands Department accepted it, as I understand the correspondence, in this way. We accept the statement of Mr. Denehey, that the residue of the lot is comparatively valueless, but if there is any which can be reclaimed, or is not covered with the waters as they stand at present penned back by the mill dam on the river Scugog, you can have them.

Now I quite agree that these letters cannot be looked at to control the language of the patent, but all these negotiations and extrinsic facts and circumstances can be referred to for the purpose of construing the words themselves, coupled with the further important fact that the Crown Lands Department when making the grant were aware of all these facts and their importance in connection with the navigation, and it is not an uncharitable view to take that had the department known the actual fact that the plaintiff, whilst paying for 60 acres at 10 shillings an acre, and acquiring the residue at an almost nominal price, was acquiring some 87 acres, or more, they might have declined to issue the patent at all.

Here then we find all parties aware that the Government had gone to considerable trouble and expense for the purpose of improving the navigation of the Scugog river, and had for that purpose erected a dam which had the effect of flooding a very large portion of this lot, according to the plaintiff's own statement all but 60 acres. I say with all these facts before them we find the Government granting a patent to the plaintiffs of what purported to be by actual survey 60 acres, but throwing in as it were any other portions which were not in fact submerged, and I apprehend that beyond all question all these facts could be looked at in construing this patent, and thus regarded I see no difficulty in construing it as meaning we will grant you all of the lot in question which is not covered with

water without reference to the quantity, although upon your representation we assume it to be in the neighbourhood of 60 acres.

Judgment.

BURTON
J. A.

I discard the view that the actual height of the water on the very day of the concluded agreement, or the issuing of the patent, was to govern. The water might then have been very low, or there may have been a freshet. Grants are not to be construed on any such precarious and uncertain grounds. Some certain and defined land was intended to be granted. The only reasonable construction to place upon the grant is, that so much of this land as was liable to be overflowed by reason of the existence of the dam—I do not, of course, include freshets, but at the normal height of the water when the stream was full—is excepted from the grant, and the land intended to be granted was all beyond high water mark as thus understood. This renders it quite unnecessary to consider the question of the bracket boards, as the water so penned back was at these periods several inches higher than it would be when merely kept back by the effect of the boards. The result is that the 4 acres upon which the damage is said to have been done, never passed to the plaintiffs and this action fails.

HAGARTY, C. J. O. :—

I think this case must be determined on the legal effect of the Crown grant. I agree with the judgment just delivered, that we have the right to hear extrinsic evidence, not to vary or alter the plain meaning of words when such meaning is plain, but to explain the sense in which words, open to more meanings than one, have been used by the contracting parties.

I am unable to agree with the argument that the words “lands covered by the waters of the Scugog River,” mean only “the waters of the River Scugog flowing in its natural channel—the waters between its shore, in its natural condition.”

Judgment.

HAGARTY
C.J.O.

Long before the time of the grant, the Government had raised the waters of the Scugog by a dam, which naturally backed up the water on land above it, granted and ungranted.

The plaintiffs admit that they cannot claim damages resulting from the continuance of this dam, but urge that the keeping up of bracket boards, something under a foot wide, have caused damage to them by throwing back water in the dry season when the river is low, which would not otherwise lie on their land.

On the 13th of May, 1851, the Crown Lands Department assent to the proposal to purchase the whole lot, "reserving all the land covered by waters, as they at present exist, formed by the mill dam on the River Scugog."

I think the evidence fully warrants my learned brother Proudfoot's finding at the trial that at that date either the brackets were then on, or the water was so high as not to require them.

I think it very clear on the evidence, that for a considerable time in the year when the river was full the water ran over the dam at a higher point than the bracket boards could have raised it; or, in other words, that the penning back caused by the dam alone affected the plaintiffs' land in the extent of overflow as largely at least as the presence of the boards ever could affect the land when the river was low.

We then come to the grant of the 10th of January, 1852, which of course is referable to the previous contract of purchase.

The description is peculiar and very significant of the intention. 60 acres of land, more or less, are granted. They are not spoken of as a part of any lot, but an alternative description is added, viz: "being composed of lot number 9, in the 4th concession of Ops, exclusive of the lands covered by the waters of the Scugog River, which are hereby reserved." Therefore the grant did not pass any land so covered.

I can attach no other meaning to this grant except that

whatever land the Scugog River waters may cover in the ordinary changes of the seasons, sometimes to a greater and sometimes to a lesser extent, are not to pass, but remain in the Crown.

Judgment.
HAGARTY
C.J.O.

Once it is conceded that for some periods of the year, when no bracket boards are used, the waters cover the part now claimed to be injured, the plaintiffs fail in their proof of title.

Their claim seems to rest on this, that in the dry season when the waters are low, the use of the boards press the waters back on the portion in question, when it would otherwise be dry enough for cultivation. But if during the full season such land would be covered by water for a considerable period by the action of the dam alone, then it seems to me it would be land excluded from the operation of the grant.

It cannot be that it could be regarded as land reserved to the Crown during high water, but passing to the plaintiffs as soon as the water was low.

We can fully understand that in the case of a lot which had to be servient to the user of a dam legally existing, any raising of the water by boards or other means beyond the legalized height might create an actionable wrong to the owner, by, as it were, increasing the burden of the servitude. In dry seasons his land would be kept wet, which otherwise might be dry. But the construction I feel bound to place upon this grant creates the difference in the cases.

I think the judgment of the trial Judge should be restored.

OSLER, J.A.:—

Neither in the pleadings, nor at any stage of the proceedings below, have the plaintiffs contended for the construction of the patent argued for in one of the judgments delivered in the Queen's Bench Division, viz., that the land reserved from the grant was the land covered by the

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OSLER
J.A.

waters of the Scugog River in its natural channel, *i. e.*, the waters between the shores of the river in its natural condition. And I do no injustice to the learned counsel for the respondents in saying that they made no attempt to contend for the rights that such a construction would give them, but confined their complaint to the use of the bracket boards alone.

It appears to me that the language of the description, when we attempt to apply it, is of such a character as necessarily calls for parol or extrinsic evidence to explain it within the limitations of Lord Wensleydale's exhaustive dictum on the subject in *Baird v. Fortune*, 4 Macq. at p. 149. He says: "No parol evidence can be used to add to or detract from the description in the deed, or to alter it in any respect, but such evidence is always admissible to shew the condition of every part of the property, and all other circumstances necessary to place the Court, when it construes an instrument, in the position of the parties to it, so as to enable it to judge of the meaning of the instrument."

See also *Shore v. Wilson*, 9 Cl. & F. at p. 565, per Tindal, C. J., and the passage from Taylor on Evidence, sec. 1194, cited by the learned Chief Justice Armour in the Court below.

Now when the condition of the lot in question at the time of the grant is shewn it appears that it was a 200 acre lot, of which a very large portion was overflowed in consequence of the existence of the dam mentioned in the third paragraph of the statement of claim—a dam which necessarily had the effect of backing up not merely the waters of the Scugog River alone but also the waters which East Cross Creek contributed to it, and which had become part of the river before it reached the dam in question.

It was of course physically impossible to distinguish what was covered by the waters contributed by the creek from what would have been overflowed by the river alone without those of its affluent, and therefore seeing that lot 9 was in fact partially overflowed at the date of the grant—seeing a permanent dam which accounted for its being

in that condition—and seeing also that the quantity of land professed to be granted corresponded with reasonable accuracy to the amount of dry land remaining in the lot, while there would be at least twice as much if the lot was not overflowed at all, it is evident that in order to ascertain the quantity really comprised in the grant, we must ascertain the meaning of the reservation “exclusive of the lands covered by the waters of the Scugog River.”

Judgment.
OSLER
J.A.

This might mean either the land covered by the waters of the river in its natural channel—an unusual and improbable reservation, considering that the river in its natural condition was a non-navigable one—or it might mean the waters as dammed back by the Lindsay dam, which would of course include the waters contributed to the river by its affluents before reaching the dam.

Evidence was therefore properly admitted of the surrounding circumstances, and of the surveys, plans, and reports and applications preceding the patent, for the purpose of explaining this ambiguity, and of shewing what was really meant by the exception, and when admitted it shewed, I think, conclusively that the exception meant and referred to the land drowned or overflowed in consequence of the existence of the dam. It is unnecessary further to discuss the evidence on this point, as I agree with the view which has been taken of it by the trial Judge and Mr. Justice Street, and the other members of this Court in the judgments just delivered. The land thus excepted from the grant would necessarily comprise all that was liable to be overflowed at the usual period of ordinary high water, when the depth of the water flowing over the dam was two feet or thereabouts, and inasmuch as it appears that the use of the brackets for holding or retaining the water did not cause a greater or more extensive flooding than that caused by the dam itself at the period of high water, the plaintiffs have failed to prove that any land granted to them by the patent has been flooded either by the dam or by the use of the bracket boards.

As I rest my decision upon the construction of the

Judgment. patent, it is unnecessary to advert to the effect of the
OSLER alleged interruption in the use of the bracket boards, or to
J. A. the other questions argued. I think the appeal must be
allowed, and the action dismissed.

Appeal allowed with costs.

MENDELSSOHN PIANO COMPANY V. GRAHAM AND WEST.

Partnership—Loan—Debtor and creditor—Sharing profits.

Statement. THIS was an appeal by the plaintiffs from the judgment of the Queen's Bench Division, reported 19 O. R. 83, and came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A.) on the 23rd of May, 1890.

R. S. Neville, for the appellants.

E. Coatsworth, Jr., for the respondent West.

Judgment. May 26th, 1890. The Court dismissed the appeal with costs, agreeing with the conclusions arrived at in the Court below.

LIVINGSTONE V. TEMPERANCE COLONIZATION SOCIETY.

Company — Shareholder — Calls — Surrender of shares — Cancellation of shares — Compromise — Invalid resolution.

A trading corporation has authority as an incident of its existence to compromise all *bond fide* claims made against it, and therefore has power to compromise claims made by a shareholder to be relieved of his shares either by reason of fraud or misrepresentation or any other cause which would enable the Court to decree such relief; but as the Court, if a shareholder were to make a claim against the corporation for compensation in damages in respect of some matter not connected in any way with the validity of the shares held by him, could not decree a cancellation *pro tanto* of those shares, so the corporation itself cannot validly compromise a claim for damages against it by accepting the surrender of and by cancelling shares of its capital stock held by the claimant. Judgment of the Common Pleas Division reversed.

THIS was an appeal from the judgment of the Common Pleas Division.

The facts of the case were very complicated, and for the purposes of this report the following brief outline is sufficient :

In the year 1881, a number of persons, of whom the plaintiff was one, formed themselves into a society or syndicate for the purpose of acquiring lands in the North-West Territories. The scheme then in contemplation was the obtaining of an allotment of 2,000,000 acres of land from the Dominion of Canada, one third of which, called the "first third," and consisting of the best lands, was to be reserved for members of the syndicate, and the other two-thirds were to be offered for sale to the general public according to a certain plan of subscription. Subsequently a portion of the first third was also opened to subscription. The plaintiff, as agent of the syndicate, obtained a number of subscriptions, being entitled, as he alleged, to a large sum as commission for so doing. In the year 1882 the members of the syndicate and the subscribers for land were incorporated under the Dominion Joint Stock Companies Act, 1877, the charter stating the object of the company to be the acquisition of a tract of land in the North-West Territories for the purpose of colonization, etc. The capital stock was stated to be \$2,000,000, divided into

Statement. 20,000 shares of \$100 each, and the intention was to take over from subscribers for land their subscriptions, and to substitute in lieu thereof shares in the company entitling the shareholders to a certain quantity of land per share. After the formation of the company, shares were allotted in this way, and the plaintiff contended that the company ratified and adopted the alleged agreement by the syndicate to pay commissions to himself and other agents, and also that the company themselves continued his employment as agent to obtain subscriptions upon certain terms as to payment of commission. The plaintiff was a director, and for a long time manager, of the company, and held a large number of shares.

Disputes arose as to the amount to which he was entitled for the alleged commissions, and, after a great deal of negotiation, the directors and the plaintiff arrived at a settlement. The number of shares held by him was reduced in number, and two calls that had been made thereon were credited as paid, while a further sum was placed to the plaintiff's credit to be applied on future calls when these were made. A by-law was passed by the directors in terms of the settlement, and this by-law, the plaintiff alleged, was confirmed at a general meeting of the shareholders. A new board of directors, however, refused to recognize the settlement, and the plaintiff brought this action to enforce it, and also to recover certain commissions not dealt with under the settlement. The defendants contended that the alleged settlement, if entered into at all, was *ultra vires*; that there was no liability for commissions; and they counter-claimed for the amount of three calls, one of which was not due until after the commencement of the action, and also for the amount of certain sums received by the plaintiff in payment of alleged commissions.

The case was tried before GALT, C. J., and the trial occupied several days. The learned Chief Justice held that the alleged settlement was *ultra vires*, and void, and dismissed the action with costs, and gave judgment in the

defendants' favour for the amount of the first two calls, Statement.
but dismissed the counter-claim as far as the third call and the commissions were concerned.

Both parties appealed from this judgment to the Common Pleas Divisional Court. That Court refused the plaintiff's claim for commissions, but held that the alleged settlement was valid and should be enforced, and, as a consequence of this holding, dismissed the counter-claim for calls, except on the reduced number of shares. The counter-claim for repayment of commissions was allowed.

The defendants appealed from the judgment of the Divisional Court in so far as the holding as to the alleged settlement and the consequent holding as to calls were concerned, and the appeal came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A.), on the 14th, 15th, and 18th of November, 1889.

Moss, Q. C., and W. Barwick, for the appellants.

Livingstone, the respondent, in person.

May 13th, 1890. MACLENNAN, J. A. :—

The principal question in this appeal is the validity of an agreement of compromise made between the plaintiff and the company, whereby the amount of capital stock held by the plaintiff in his own name, and the names of several other persons, was reduced by surrender and cancellation from \$436,000 to \$34,720 ; that is, from 4,360 shares of \$100 each, to 868 shares of \$40 each, or a reduction of over ninety per cent.

The learned Chief Justice of the Common Pleas Division, before whom the action was tried, held the agreement invalid, but upon appeal to the Divisional Court that judgment was reversed, and the compromise was held to be good.

With great respect I am unable to take the same view of the case as the Divisional Court. It certainly seems startling that a company should have power, after being

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J.A.

in operation for over two years, to cancel and wipe out of existence more than twenty per cent. of its whole capital, standing in the name of the original projector and promoter of the company, who managed and conducted all the proceedings leading up to incorporation, who was named in the charter as a provisional director, and who was the company's general manager for the first two years of its operations. Yet that is what was done here. The company assumed to cancel more than ninety per cent. of the plaintiff's shares, and more than twenty per cent. of its whole capital, and the judgment holds the transaction to be valid.

It cannot be doubted any longer that the directors of a trading corporation have, as incidental to their power to manage the company's affairs, the power to compromise all *bonâ fide* disputes which arise with shareholders or others: Lindley's Law of Companies, p. 196; *Bath's Case*, 8 Ch. D. 334; *Dixon v. Evans*, L. R. 5 H. L. 606.

In the present case, it is evident that disputes had arisen between the plaintiff and the company upon several matters, and there can be no doubt of their real *bonâ fide* character, and in his most careful and elaborate judgment, Mr. Justice Rose, who delivered the judgment of the Court, rests his opinion in favour of the validity of the agreement upon that ground.

After stating his opinion that the compromise of a real dispute, not a mere sham, not intended to effect an ulterior object, was not *ultra vires*, and was something that a Court of Justice ought to respect, and ought not to permit to be questioned, he proceeds thus:

"The agreement appears to have been a settlement of disputes as to the right of the plaintiff to obtain and hold for his own benefit certain shares which he purchased from the subscribers, the question being raised that the benefit of such purchase should be to the company.

"Also a dispute as to the plaintiff's right to apply the instalments of land credit in payment of calls on stock. Also a dispute as to his right to certain stock which the

company had declared forfeited. The plaintiff gave up his claim to this stock, the company to pay him a sum in cash which he had paid to one Boulton, through whom he purchased some of the shares, and also a certain sum for commissions."

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J.A.

The learned Judge proceeds :

"I confess I do not clearly apprehend the disputes or the nature and effect of the settlement, and when counsel appeared for the plaintiff on the first argument, it was not thought necessary to explain clearly what they were, as unless the settlement could be sustained for the reasons given by the company, (*qu.* plaintiff ?) it is not material whether it was such a settlement as one would have deemed fair. The discretion rested in the directors or the company, and the Court will not review it as above pointed out."

Further on, after mentioning the objections made by the defendants' counsel, the learned Judge says :

"The objection as to the trafficking in stock is not tenable, if the authorities above referred to govern this case, and by the same authorities the directors had authority to compromise the plaintiff's claims and settle the dispute." The authorities referred to are *Bath's Case*, 8 Ch. D. 334 ; *Dixon v. Evans*, L. R. 5 H. L. 606 ; and *Morawetz on Private Corporations*, secs. 24, 430, 302, and 841.

Now, I think it appears from what I have quoted from the judgment that the learned Judge was of opinion that if only there was a *bonâ fide* dispute between the company and a shareholder, that gave the company the power, as part of an agreement for the compromise of the dispute, to relieve the shareholder of his shares, or of some of them I think he overlooked, what seems indeed obvious, that it is only where the dispute concerns the validity of the contract to take shares, or the validity of the holding, that shares may be cancelled by way of compromise, when it would otherwise be illegal. If the surrender or cancellation of shares be not within the ordinary powers of the company, they cannot be surrendered or cancelled as part of an agreement for the compromise of a dispute, not about

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the subscription, or the right to, or the validity of the shares themselves, but about some other matter.

Directors may make compromises just as they may make other agreements, but in doing so they may not introduce any illegal element; they may not do anything *ultra vires* in making an agreement of compromise any more than in making any other agreement. Where there is a dispute whether a man is a shareholder, or whether shares have been allotted and accepted, the dispute must be settled somehow, and directors have power to settle it, but unless by charter or statute, they have power to cancel or take surrender of shares; undisputed shares cannot be so dealt with incidentally in a dispute about some other matter.

Dixon v. Evans, L. R. 5 H. L. at p. 618, shews that they may compromise a *bonâ fide* dispute as to whether a person is or is not a shareholder, and may strike his name off the list, but neither that case nor any other to which we have been referred, decides that in settlement of a dispute about something else, directors may agree to cancel shares regularly issued and allotted, and about the issue and allotment of which there is no dispute.

In *Bath's Case*, 8 Ch. D. 334, the Court of Appeal held that although the shares were really valid, yet a *bonâ fide* question of their legality having been raised, and an agreement for their cancellation having been made in order to settle the question, the cancellation was good as between the shareholder and the company.

But at p. 342 Jessel, M. R., thus expresses the ground of his decision: "Now what was the legal effect of that arrangement? If I am right in what I have said, that the arrangement being made *bonâ fide*, and being an arrangement for compromise of a question as to whether or not the shares were legally issued, was a valid arrangement, what effect would it have on the Company? Surely it would be valid," etc.

So also in *Dixon v. Evans*, L. R. 5 H. L. 606, both Lord Westbury and Lord Cairns are at great pains to point out

that there was an actual *bonâ fide* dispute between Mr. Dixon and the company whether or not he had a right to be removed from the list of shareholders.

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MACLENNAN
J. A.

In Lindley's Law of Companies, p. 521, the law is stated thus: "If it is doubtful whether a person ever was a shareholder or not, an agreement releasing him from all liability, if any, may be validly made, so as to bind the company; and an allotment of shares made pursuant to an invalid resolution may be properly cancelled, at all events before the shares are registered in the name of the allottee. But a general power to compromise does not authorise an agreement to allow a shareholder to retire, when there is no dispute as to his membership, and where there is no power to buy or accept a surrender of shares."

If, therefore, there was in this case no dispute about the plaintiff's subscription for, or his being the holder of, the shares in question, and if the directors had no general power by their charter or otherwise to cancel, or accept surrender of, shares, it necessarily follows that the cancellation of the plaintiff's shares was illegal, and the agreement in question invalid.

It was not suggested that the agreement was one which was divisible, and might be good in part, though invalid as to other parts. It must stand or fall as a whole. Therefore, the circumstance that there was dispute about a small number of the shares as to whether they had or had not been legally forfeited may be disregarded; and as to the rest there does not appear to have been any dispute whatever. None is suggested by the learned Judge in his judgment, and it is difficult to see how there could be any dispute.

The only thing that was suggested in argument was that the plaintiff took his shares on the faith that he should be allowed to pay for them *pro tanto* by what is called the land credit, that is to say, that he should sell to the company 50,000 acres of land at \$3 an acre, which he was first to buy from the company at \$1.10 per acre, an operation which would make him a creditor of the company to the

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amount of \$95,000. For this the plaintiff relied upon a resolution passed on the 20th December, 1881, by the promoters, which is as follows :

"The committee on charter reported progress, and in part that they were advised by the solicitors, that the stock of the company would have to be put into a cash form, whereupon resolved :

"That the capital stock be \$2,000,000 or 20,000 shares of \$100 each, and that each subscriber entitled to land in the first third, be allowed to take shares in proportion to the land subscribed for by them, that is, at the rate of three shares for every 100 acres of land so subscribed for and held by them."

There is not a word here about a land credit, it simply limits the number of shares which each land subscriber would be entitled to take, and so far from giving colour to the claim for land credit, it is just the other way, and shews that the stock would have to be in a cash form.

Early in January, 1882, the application for the charter was prepared and a notice was published in the *Gazette* of the 7th of January, which contains the names and addresses of one hundred and four applicants, including the plaintiff.

On the 23rd of January a resolution was passed at a meeting of promoters that "payments to stock shall be 10 per cent. down, balance at the option of the board, but not more than 10 per cent. per call, and not oftener than annually," and on the 26th of January a general meeting of subscribers was held, and a report was adopted on which great reliance was placed in favour of the land credit. That report contains the following passages :

"A draft prospectus and stock book have been prepared, and are hereunto submitted.

"We have given encouragement to several of the subscribers to lands in the first third, that they would be allowed to take stock instead, on the basis of three \$100 shares for each 100 acres of such land, returned to the society, on payment of the subscribed price for the land, any excess which the land was to cost them over \$3 per

acre being payable at the rate of \$1 per acre per year, provided that if they are good security, and responsible for the amount, the balance of the \$3 per acre, over and above the 10 per cent. required to be paid in cash on the stock, may be paid as the stock is payable on call, not oftener or more than 10 per cent. per annum.

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J.A.

"The lands in the first third will be payable at the rate of \$1 per year per acre, after the cash payment of \$2 per acre for lands costing over \$2, or cash in full if preferred by the subscriber, the unpaid balances being on interest at $6\frac{1}{2}$ per cent.

"We submit herewith a list of names with the amounts severally, which we would recommend for such allotment of stock, provided they give satisfactory security for the unpaid balance of their stock, the stock being specially designed as a basis of credit to the extent of its amount subscribed or paid up."

The report, of which the foregoing was part, was signed by the plaintiff, and it was adopted by the meeting.

Now, it is evident that this was merely an announcement and understanding between the promoters themselves, and affected no one else. The company was not yet formed, and to be of any use to a shareholder it was necessary for him to make it a part of his contract with the company to take shares.

It was a proposal which, if carried out, would have been very beneficial to the plaintiff and his twenty associates who subscribed for land at \$1 or \$1.10. It would have given them at once nearly half a million dollars of the paid up capital of the company to be divided between them, and the plaintiff's share would have been, in respect of the 50,000 acres subscribed by him, \$95,000.

But when the parties applied for the charter no reference was made to the understanding above set out; all parties subscribed for and obtained their stock unconditionally. The petition for the charter was signed by the plaintiff and others, and verified by the plaintiff's statutory declaration. It was accompanied by a stock subscription

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signed and sealed by 130 persons, including the plaintiff, applying for and agreeing to take their shares unconditionally, and the plaintiff was a subscriber for 1,850 shares.

The charter was issued on the 14th of March incorporating thirty-eight named persons, and others who might become shareholders, and the plaintiff is therein named as a corporator with 1,850 shares, and 10 per cent. paid up thereon, and he is also made a provisional director.

After the charter was issued the plaintiff's name was entered in the statutory list of shareholders as the holder of 2,500 shares. He was himself appointed the company's manager; and on the 5th of July, at a meeting of shareholders at which he was present, his name is found entered on the minutes of the meeting as the holder of 2,500 shares.

Reliance was placed on the fact that at the meeting of shareholders of the 5th of July, 1882, the report above mentioned, which was approved at the meeting of promoters on the 26th of January, 1882, was approved and confirmed, but nothing done at that meeting could affect the plaintiff as a holder of shares, for he had taken his shares before the meeting without any qualification.

I think, under these circumstances, it would be impossible for the plaintiff to raise any question or dispute that could be called *bonâ fide* as to the validity of his holding of the number of shares standing in his name. Whatever other shareholders might be able to say or complain of, any dispute about the validity of his shares by the plaintiff, who arranged and managed everything in connection with the issue of the charter, and the allotment of the shares, and who was made a corporator with 1,850 shares by the charter itself, could not be anything else than a sham.

Disputes might certainly arise about the land credit, and such disputes did arise, though I think the three subscription papers of the 6th and 28th of September were utterly nugatory and ineffectual for any purpose, except as agreements between the parties to contribute to expenses in

certain proportions. The three papers are substantially the same in effect. They all say the subscribers will take so much land, which is said to be for sale by the Government at \$1 per acre, but there is no sense in saying, as two of them do, that they will buy at \$1.10 and \$3 per acre, land which is to be had for \$1.

There is no one named in any of the papers as vendor, unless it be the Government, and there is nothing to indicate who is to receive, or what is to be done with, the excess over the government price of \$1 per acre.

Therefore, if the plaintiff had claimed a land credit from the company on the strength of his being a subscriber of the paper of the 6th of September, I think no disinterested board of business men would have listened to his claim for a moment, and I agree with Mr. Justice Rose when he says that he is unable to see that the subscribers to the first third had any agreement or rights which could have been enforced against the company after its formation. The land never was theirs. They never got it, and never had the shadow of an interest in it. The Government refused to give it to them, and it was purchased on certain terms by the company, and never belonged to any one else. The notion of the first third subscribers selling the company's own land to the company is simply absurd.

I am therefore clearly of opinion that the plaintiff could not in this case have raised any question or dispute about his shares which could in law be called *bonâ fide*, and which if raised would have been sufficient to support the agreement in question : *Dixon's Case*, before Lord Justice Giffard, L.R. 5 Ch. 79; *Lord Belhaven's Case*, 3 D. J. & S. 41, per Lord Justice Turner; Lindley on Companies, p. 521 note (t.)

The only evidence pointing to any dispute as to the validity of the plaintiff's shares is in the recital of the by-law of the 17th of June, 1884, but I think that is not entitled to any weight, as it is the very foundation of the agreement which is under impeachment. The other recitals contained in that by-law are incorrect, and the recitals

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Judgment. were all evidently prepared and inserted in order to give
MACLENNAN an apparent ground for the cancellation of shares which
J.A. it proceeds to authorize.

It is to be observed, too, that even if the land credit agreement could be regarded as affecting the plaintiff's shares, it could only affect 1,500 out of 2,500 standing in his name. His land subscription was 50,000 acres, which by the resolution of the 20th of December, 1881, and the 26th of January, 1882, would entitle him to only 1,500 shares, so that in any view he had 1,000 shares of \$100 each taken and subscribed by him without reference to the land credit, which alone would be equal to 2,500 shares of \$40, whereas he has been relieved of all but 868.

I think the lengthy proposal of settlement of the 13th of January, 1885, prepared by the plaintiff, which was accepted by the directors, shews clearly that there was no dispute, with him at all events, about the validity of his holding, for he there goes on to enumerate his holdings in his own name and in the names of others, amounting in all to 4,360 shares of \$100 each.

The further question remains whether this company or the board of directors had inherent power to cancel or accept the surrender of shares, as was contended before us by the respondent.

I think it is almost too clear for argument that they had no such power. The company was incorporated under the Dominion Joint Stock Companies' Letters Patent Act of 1877, 40 Vic. c. 43, (D.) and the capital was fixed at two million dollars, divided into \$100 shares.

Section 20 of the Act provides for increasing the capital, and section 21 for diminishing it, by by-law to be passed by the board of directors; and then section 22 provides that no such by-law shall have any force or effect whatever until after it has been sanctioned by a vote of not less than two-thirds in value of the shareholders at a meeting called for the purpose; nor unless it afterwards be confirmed by supplementary letters patent.

I think the effect of these sections is to prohibit the

cancellation or surrender of shares, because that is in effect a reduction of capital, which may not be done otherwise than in the prescribed manner: Lindley, 525, 526.

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J.A.

This view is confirmed, if that were necessary, by section 55, which provides for the forfeiture of shares for non-payment of calls, and declares that forfeited shares become the property of the company, and may be disposed of as the directors may ordain. They are not extinguished, and may be issued again. So also section 58 forbids the payment of dividends whereby capital is reduced.

Trevor v. Whitworth, 12 App. Cas., at pp. 432, 433, 436, 438, shews that in a company like this shares cannot be cancelled or surrendered. See also *In re Mersina, etc., Construction Co.*, 1 *Megone* 341; and *Lee v. Neuchatel Asphalte Co.*, *ib.* 140.

The respondent also contended that a company like the present could do anything whatever in relation to its own affairs, and that the cancellation of its shares must be within its power, and that the decision in *Ashbury, etc. Co. v. Riche*, L. R. 7 H. L. 653, depended on express provisions of the Companies Act. But this is not so. In *Baroness of Wenlock v. River Dee Co.*, 10 App. Cas. at pp. 354, 359, 360, 361, 362, it was held that the doctrine of *Ashbury v. Riche* applies to all companies created for a particular purpose, and in *Attorney General v. Great Eastern R. W. Co.*, 5 App. Cas. 473, it is said that whatever is fairly incidental is *intra vires*, but what is not permitted is forbidden.

I am, therefore, of opinion, with great respect, that the judgment of the Divisional Court should be reversed, and that the agreement for compromise must be declared invalid.

I think also that, if the appellants ask for it, they are entitled to an account of any money of the company received by the plaintiff by way of commissions, after the company was incorporated, and also an account of what he owes for calls on his shares.

With regard to the third call, which was made on the

Judgment. 22nd of October, 1885, and became payable on the 31st of December, and which, though not yet due when the counterclaim was filed, is claimed thereby, I am of opinion that inasmuch as the plaintiff pleaded to it, and as the defendants could, under Rule 153 of the Judicature Act, have properly claimed it in this action, either by amendment or further pleading, there is no reason why that call should not also be included in the judgment for the defendants.

MACLENNAN
J.A.

HAGARTY, C. J. O. :—

The facts in this extraordinary case are so complicated that it is very difficult to reduce them to any short summary. Many things seem to have happened which present an almost unintelligible aspect.

It is not easy to understand how, in a company chartered as this was, with a declared capital of two millions, and a specified number of shares of \$100 each, there should have existed three classes of stock-holders, each to enjoy a widely different pecuniary interest in an undertaking based apparently on perfect equality. The assets of the undertaking are stated as so many acres of land, all to be obtained from the Government at a fixed price per acre. One class of subscribers are to get many thousands of acres at that price—another much larger class is to get it at a price three times greater. In the absence of anything in the charter or in any articles of association providing for this difference, it is not easy to understand how some of the subscribers could have knowingly joined in an adventure based apparently on perfect equality, but so very partial in operation.

The plaintiff seems to have been the most active promoter, and for some two years manager, of the company. He never owned or had allotted to him an acre of the land. He subscribed for 2,500 shares, and for 50,000 acres of the land. He never appears to have in any way become entitled thereto. Yet, by the alleged operation of

certain meetings and resolutions of the promoters, and the alleged recognition by the company of these proceedings, after the charter, he is allowed to appear in the books as a creditor of the company to the amount of many thousands of dollars on the strength of his being entitled to his 50,000 acres at one dollar per acre, while the bulk of the other subscribers have to pay three dollars, and another class a still larger price.

All this seems hardly credible and yet appears to have been done or allowed.

When this extraordinary claim is made the alleged consideration for a settlement or compromise, now insisted on, by which this plaintiff's stock is reduced from some \$436,000, to some \$34,720, it may well be enquired whether it be possible to support such an arrangement.

I agree with the reasons given by my learned brother MACLENNAN for refusing to uphold this alleged compromise.

The whole case presents a most unpleasant aspect.

We may well believe that most of the parties who went into this large adventure did not intend any wrong. But the very large amounts of money involved in the shape of shares for which they made themselves liable—in the present plaintiff's case some 25,000 shares at \$100 each, amounting to \$250,000—and other large subscriptions, are rather startling, unless in the case of subscribers of very large means.

Men subscribed for thousands of acres of land, when any enquiry would have shewn them that no title could be made, except by actual settlement, even to 240 acres.

Perhaps the very serious lesson which this ill-starred adventure teaches will not be wholly lost, but may have a wholesome influence on future speculators, whether actuated by philanthropic or wholly mercenary motives.

It is an unsatisfactory result to men of fair standing to have their good faith vindicated at the cost of their character for common intelligence.

Judgment.

HAGARTY
C.J.O.

Judgment. BURTON, J.A. :—

BURTON
J. A.

The plaintiff made originally two distinct classes of claims :

(1.) For commissions amounting to upwards of \$134,000, reduced at the trial by \$60,000, but which was wholly disallowed by the learned trial Judge as also by the Divisional Court, and the plaintiff has, I think, wisely abstained from appealing against that decision, so that that portion of his claim is not before us.

(2.) Under the settlement made in January, 1885, under which, (*inter alia*), the holding of the plaintiff in the capital stock of the company was reduced from 2500 shares of \$100 each to 868 shares of \$40 each, besides the cancellation of other shares owned or controlled by the plaintiff, and I agree with the respondent, that the sole question is “ was that settlement valid and binding ? ”

It cannot, of course, be disputed that a corporation has authority as an incident of its existence, to compromise all claims *bonâ fide* made against it instead of contesting them in a court of justice and that this power may be carried out by the managing body or board of directors. This power necessarily extends to claims made by a shareholder to be relieved from his shares either by reason of fraud or misrepresentation or any other cause which would enable a Court to decree such relief ; and within the limits of the relief which the Court itself could grant, the company itself, provided always that the arrangement is *bonâ fide* and not colourable, can deal with the shareholder by way of compromise.

But the company could not by a compromise or arrangement do what the Court itself would have no power to do if the matter had been litigated. In other words, if the claim by a shareholder was for something which might be compensated in damages, not connected in any way with the validity of the shares, the Court, though awarding damages, would have no power to decree a cancellation *pro tanto* of the shares held by the claimant in the capital

stock, and it would follow that a compromise of that nature must be wholly invalid and void.

Here there was no dispute as to the shares or the plaintiff's subscription for them. He not only subscribed originally for 2500 shares, but as the chief promoter of the company, he forwarded the list containing his own subscription, and verified by the affidavit required by the statute, with the petition asking for the incorporation of the company.

There could not be therefore, and there was not in fact any dispute as to the plaintiff being a shareholder in the company.

The dispute was as to his right to claim credit on his calls upon these shares for what is styled throughout as the "land credit." I do not propose to discuss the validity of this claim because I quite agree with my learned brother MACLENNAN, in his very clear and able review of the facts in dealing with that part of the case, and the conclusion at which he has arrived as to the law. The claim itself is so utterly untenable that certainly the discretion and perhaps the *bona fides* of the directors might have been questioned if they had made a compromise even in the way of an allowance in respect of this claim, but when they based upon it a right to wipe out a large portion of the capital of the company it is manifestly one which was altogether *ultra vires*.

Even if the case had been one in which the plaintiff had been entitled to land which he was disposing of for the company in payment of the stock for which he had subscribed, it is clear that he could not have relieved himself from paying the calls in cash, there being no agreement registered as required by section 83 of the Companies Act, which declares that the shares shall be subject to the payment of the whole amount thereof in cash unless the same has been otherwise agreed upon or determined by a contract duly made in writing and filed with the Secretary of State before the issue of the shares. But here the lands were the company's lands, not the plaintiff's, and any

Judgment.

BURTON
J.A.

Judgment
BURTON
J.A.

claim therefore of the kind was so utterly unfounded in law that it could scarcely have been entertained for a moment by a board of directors acting in the interest of the general body of shareholders.

I think, therefore, that the so called compromise by-law was bad, and it is conceded that it never was confirmed by a properly constituted meeting of shareholders, if such a meeting could have confirmed it, which I think it is quite clear they could not.

The respondent, who argued his own case, contended that the cases cited by Mr. Moss were inapplicable inasmuch as they were decided under English Acts containing restrictive clauses not to be found in our Act of 1877.

There is, I think, not only an inaccuracy, but a manifest fallacy in this argument. It is a fundamental principle of company law that the amount of a company's capital, when once fixed, cannot be varied without the consent of all who join the company. That is between the shareholders *inter se*; but there is this further objection that the rights of creditors may intervene. Persons who deal with, and give credit to, a company like these defendants, naturally rely upon the fact that they are trading with a certain amount of capital already paid, as well as upon the responsibility of its members for the capital remaining uncalled.

This principle is, I think, fully recognized in our Act of 1877. When Parliament sanctions the doing of a thing under certain conditions and with certain restrictions, it must be taken that the thing is prohibited unless the prescribed conditions and restrictions are observed.

Our Act allows a company to reduce its capital under conditions which carefully protect the interest of creditors.

This is, I think, sufficient to shew that what was proposed to be done here was unauthorized in law.

I think the learned Judge at the trial was right in refusing to allow the defendants' counter-claim for the third call; it was not due when the counter-claim was pleaded, and as it could not then have been recovered in an action instituted on that day, neither ought it to be recovered on this counter-claim.

But on referring to the objections taken at the trial, I find that they were confined to the one point that the call was not due at the time the suit was instituted, and the learned Judge appears to have decided against the recovery on that ground ; but that is not the law, and had the objection been that it was not due when the counter-claim was pleaded, it would have been the duty of the Judge, unless some valid objection was made, to allow a new counter-claim to be pleaded, and on such an application it is reasonable *now* to assume that it would have been done, and as the Divisional Court have now allowed a recovery for the third call, I think no objection exists to its being placed on the same footing as the other two.

The defendants are also entitled to recover back the dividends paid, and to have an account of the moneys specifically mentioned in the counterclaim, and alleged to be wrongfully retained.

OSLER, J. A. :—

I have given this case my best consideration, and having had an opportunity of reading and discussing the opinion which has just been delivered by my learned brother MACLENNAN, think it only necessary to add that I agree in its reasoning and conclusions, and that the appeal should be allowed.

Appeal allowed with costs.

Judgment.

BURTON
J. A.

IN RE DINGMAN AND HALL'S CONTRACT.

Sale of land--Vendor and purchaser--Contract--Time for completion--Interest.

Where in a contract for the sale and purchase of land, the parties fix the time for payment of the purchase money and the period from which interest thereon is to be computed, irrespective of the time fixed for completion, interest must, in the absence of default or breach of contract or of actual misconduct in relation thereto on the part of the vendor, be paid from the period named, notwithstanding the existence of difficulties as to title justifying the purchaser in refusing to complete until they are removed.

Judgment of BOYD, C., reversed.

De Visme v. De Visme, 1 Mac. & G. 352, observed upon as being no longer authority.

Statement.

THIS was an appeal by the vendor from two orders made by BOYD, C.

The contract out of which the appeal arose was made by articles under seal on the 28th of June, 1889, and was for the sale of a parcel of land on the south side of Wellington Street, Toronto, known as lots A, 1, 2, 3, plan 52, having a frontage of 136 feet 8 inches, by a depth of about 185 feet, more or less, to a street called Piper Street, with the interest of the vendor in the lane running from Wellington Street to Piper Street, on the west side of the said lots. The price was \$58,083.33, and was payable substantially in the following manner:—A deposit of \$500 was to be paid down; the purchasers were to assume the payment of two existing mortgages amounting together to \$34,000; they were to give two new mortgages for \$4,000 and \$5,000 respectively, bearing date the 1st of July, with interest at six per cent. half-yearly, to run for five years from date, and the balance was to be paid within twenty days from the date of the contract, without interest to that date. It was also provided that taxes, insurance, rentals, and all municipal rates and charges affecting the property, and all interest on the mortgages assumed by the purchasers, were to be paid by the vendor up to the 1st of July, 1889, after which date they were to be assumed by the purchasers, and all adjustments were to be paid at the date of closing.

The contract also contained the following special stipulations :

"The vendor shall not be required to furnish any abstract of title, evidences of title, or any copies of same, other than those in his possession or power.

"The purchasers to be allowed 20 days to accept the title at their own expense, and all requisitions on title to be served in writing on the vendor's agent within 15 days, and time to be of the essence of this agreement. An abatement of the purchase money will be allowed in the event of the frontage not being as represented, the land being sold at \$425 per foot frontage.

"If the purchasers insist upon any objection to title which the vendor is unwilling or unable to remove, he reserves the right to rescind this agreement and refund the deposit."

The vendor furnished to the purchasers' solicitors the abstracts, documents, and evidences of title in his possession or power without delay, and on the 12th of July the latter served a number of requisitions which were answered by the vendor's solicitors on the 15th, who gave all the information they had on all the points of enquiry, but without prejudice.

Nothing further passed between the solicitors until the 18th of July.

On that day there was some correspondence between the solicitors as to closing the matter, and on the following day the purchasers' solicitors wrote to the vendor's solicitor objecting to the answers to the requisitions and asking for certain proofs.

The purchasers also at once prepared a petition under the Vendors and Purchasers Act which, after setting out the contract, and what had taken place between the solicitors, enumerated eight points of objection to the title, among others that an undivided interest in a small portion of the land was outstanding in Mrs. Meredith, and that the purchasers had not been furnished with evidence, as they should have been, of possession by the vendor and his pre-

Statement. ²³₂₂decessors in title of part of the lands fronting on Piper Street.

The prayer of the petition was :—" That an order be made directing the vendor to remove the objections to the title to the lands in question unanswered by the answers to the requisitions, and that, if necessary for the purpose of shewing a good title to the said lands, the matter be referred to the Master in Ordinary under the direction of this Honourable Court."

After this, a good deal of correspondence took place between the solicitors, the solicitor of the vendor assisting in clearing up the questions raised by the purchasers' solicitors, but contending that he was under no obligation to do so, and he also obtained a quit claim from Mrs. Meredith.

The petition was heard on the 4th of September, when, by consent, an order was made referring it to the Registrar of the Chancery Division, to inquire and state whether the vendor could make a good title, and if so, when such title was first shewn, and further directions and costs were reserved.

On the 23rd of September the Registrar made his report. He found that nine objections were taken before him, but that the title was good ; that title was shewn to all but an undivided interest in nine feet of the land before the filing of the petition, and to those nine feet between the filing and presenting of the petition to the Court; that the objection to the title to the nine feet was taken on the 12th of July, and that the vendor's answer was not sufficient ; and, finally, that the vendor had, before the filing of the petition, furnished the purchasers with all the evidences of title and copies then in his possession or power, and that the objection as to the undivided interest in the nine feet, was not removed by any document which was in the vendor's possession or power before the day for completion, but by the execution of a new conveyance.

The purchasers were not satisfied with this report, and gave notice of appeal, objecting that the referee should have found that the title to the nine feet was first shewn in the

course of the reference, and that title was also first shewn ^{Statement.} during the reference to a strip of the land lying adjacent to Piper street, by length of possession.

By consent, the hearing on further directions, and the appeal from the report, came on together before BOYD, C., on the 26th of September, when the first order which was the subject of this appeal was made.

By this order the learned Chancellor dismissed the appeal from the report, declared that the title was good, and that the purchasers were liable to pay interest on the purchase money from the 14th of August, 1889, the day on which the quit claim of the nine feet was first exhibited to them.

He further ordered the vendor to pay the costs of the purchasers of the proceedings on the petition so far as the same were occasioned by the requisition in respect of the nine feet.

He gave no costs to either party of the proceedings relating to Piper Street, and as to the other costs of the petition, he awarded them to the vendor.

When this order came to be drawn up, it was discovered that there was a clerical error in the report of the Registrar, and by consent, words were introduced into the order to correct it.

After the order was drawn up, the vendor moved in Chambers for leave to appeal from the report, so far as it found that title to the nine feet was not shewn until after the filing of the petition, contending that the title was good without the conveyance which was afterwards obtained.

This application was refused, the learned Chancellor holding that the report could not be opened up after the order on further directions had been made, but he gave leave to appeal from the order refusing leave.

The vendor appealed from both orders, and the appeal came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A.), on the 12th of March, 1890.

Argument.

Moss, Q.C., T. A. Rowan, and James Ross, for the appellant. The Chancellor was wrong in making interest run only from the day upon which the quit claim was obtained, instead of from the date fixed in the contract, and he was also wrong in making the vendor pay the costs of the proceedings. The quit claim was procured merely to facilitate the closing of the matter, and was not necessary for the actual purposes of the title which was good apart from this quit claim. The purchasers were moreover relying upon other objections with which the quit claim had nothing to do. All these objections were found against them, and they should have been ordered to pay the costs. The question of the time from which interest should run was not raised in the petition, and should not have been dealt with. That was a matter that was settled by the contract, and the parties had no right to go into that question on a summary application such as this was. Assuming, however, that there was jurisdiction to consider the question, then that question has been wrongly decided. Where the contract itself fixes the time from which interest is payable, that time must govern in the absence of improper conduct or improper delay on the part of the vendor. It is not right simply to determine the question by ascertaining when title was first shewn. All the proceedings should have been looked at, and the vendor should not have been deprived of interest in the absence of actual misconduct on his part: *Monro v. Taylor*, 8 Ha. 51; S. C. 3 Mac. & G. 713; Fry on Specific Performance, 2nd ed., secs. 1381, 1385. If nothing is said in the contract as to interest, it runs from the time fixed for completion unless there is some deliberate default on the part of the vendor. Mere delay caused by difficulties in connection with the title and not the fault of the vendor personally, will not relieve the purchasers from paying interest: Fry on Specific Performance, 2nd ed., secs. 1381, 1385; *In re Thompson, Biggar v. Dickson*, 2 Ch. Ch. 196; *Esdaile v. Stephenson*, 1 S. & S. 122; *Monk v. Huskisson*, 4 Russ. 121; *Greenwood v. Churchill*, 8 Beav. 413; *Sherwin v. Shakspear*, 5 D. M. & G. 517; *Vickers v. Hand*,

26 Beav. 630; *Lord Palmerston v. Turner*, 33 Beav. 524; *Argument*.
Upperton v. Nicholson, L. R. 6 Ch. 441. If the proceedings and material before the referee are looked at, then it is shewn clearly that the conduct of the purchasers has really been the cause of the delay and of the expense, so that the purchasers ought to be ordered to pay the costs: *Parr v. Lovegrove*, 4 Drew. 170; S. C. 4 Jur. N. S. 600; *Long v. Collier*, 4 Russ. 267; *Graham v. Stephens*, 27 Gr. 434; *Haggart v. Quackenbush*, 14 Gr. 701; *Platt v. Blizzard*, 29 Gr. 46. The Court has the right upon the question of costs to go behind the report, and look at all the proceedings: *Downey v. Roaf*, 6 P. R. 89. If the report, as it stands, justifies the decision as to interest then the appellant should be allowed to appeal from it, as it is clearly wrong. The fact that the order on further directions has been made is no bar to the appellant being allowed to appeal from the report. That order was pronounced by consent at the same time when the purchasers' appeal from the report was disposed of, and it is not in any way a bar to the right of the vendor to appeal from the report also. At any rate, if the order on further directions, while it stands, is a bar to this appeal, then it should be set aside as having been made by mistake and inadvertence: *Flower v. Lloyd*, 6 Ch. D. 297; *In re Swire, Mellor v. Swire*, 30 Ch. D. 239; *Mullins v. Howell*, 11 Ch. D. 763; *Hewitt v. Hull Building Society*, 4 Times L. R. 35.

S. H. Blake, Q. C., and *Kilmer*, for the respondents. The objection that there was no jurisdiction to consider the question of interest and costs was not raised in the Court below, but on the contrary, these questions were argued and disposed of. It is true that the question of interest is not specifically mentioned in the petition, but it could have been raised by petition, and the vendor having argued the question, that is equivalent to a consent to its being raised, and it is too late now to take that objection. The vendor was clearly at fault in this matter. There is no doubt that registration is necessary before a good title is made out: *Kitchen v. Murray*, 16 C. P. 69; *Laird v.*

Argument.

Paton, 7 O. R. 137; *Bradey v. Walls*, 17 Gr. 699. The purchasers should not pay interest except from such time as they could with safety accept the title, and could enter into possession of the property, and they could not do that unless the quit claim deed were registered; and as that quit claim deed has not even yet been registered, the order appealed from is really too favourable to the vendor as it stands. The only thing that this Court can consider is whether the order on further directions is proper, having regard to the material upon which it was based, and clearly it is right: *De Visme v. De Visme*, 1 Mac. & G. 352. The vendor did not appeal from the report but consented to the order on further directions being made and cannot go behind it. If the order on further directions has been agreed to by the appellant under misapprehension or mistake, then his remedy is to apply to the judge who made the order to give him such relief as may be proper in the premises; there is no right of appeal on that ground: *McNabb v. Oppenheimer*, 11 P. R. 214. On further directions it is not proper to look at anything except the previous judgment or order, and the report made in pursuance of it. There is no right to go into the evidence and other material that may have been put in before the referee or master: *Gould v. Burritt*, 11 Gr. 234. In fact, however, in this case, that rule was not strictly adhered to, and the evidence and material were considered by the learned Chancellor, and his decision is based, not only upon the report itself, but also upon this evidence and material, and he has come to the conclusion that the vendor's conduct was the true cause of the delay, and has ordered him to pay interest and costs, and his finding should not be interfered with. It is clear that the vendor could not show a good title until long after the time fixed for completion. A possessory title was set up to part of the land but a purchaser need not accept a possessory title unless it is perfectly free from doubt, and the possessory title here offered was not free from doubt: *Pyrke v. Waddingham*, 10 Ha. 1. In the absence of a special agree-

ment to the contrary, a purchaser does not become liable for interest until possession is given, or is ready to be given, and possession cannot safely be taken by him until a good title is shewn. The cases cited by the appellant will all be found when examined to be cases of peculiar agreements in which interest was to be paid under all circumstances. For instance in *In re Thompson, Biggar v. Dickson*, 2 Ch. Ch. 196, there was a distinct agreement to pay interest from a certain date, and the purchaser was getting the benefit of having the title quieted. Of course, where an express agreement of this kind is made, interest runs from the date fixed, unless the vendor has been guilty of such conduct as to disentitle him to payment of interest. In the present case, however, there is no complaint that the purchasers were acting in bad faith, and the whole delay has been caused by a *bond fide* dispute as to the validity of the title, a dispute, moreover, which has been decided in favour of the purchasers, and they certainly should not be made to pay interest. The vendor has been in possession of the property, and in receipt of the rents and profits, and it would be inequitable to allow him to receive the rents and profits, and also interest upon the purchase money. The general rule is clear that no interest is payable if the non-completion arises from the vendor not being able to make title: *Dart's Vendors and Purchasers*, 6th ed., pp. 708, 709, 719, 722.

Moss, Q.C., in reply.

May 13th, 1890. MACLENNAN, J. A. :—

The appellant's complaint is that while his contract gives him interest on \$43,000 of his purchase money from the 1st, and upon the remainder from the 18th of July, the judgment on further directions limits him to interest from the 14th of August, upon the whole. He also complains of the disposition of the costs of the petition, and of the reference as to title.

The reason why he considers it important to get leave

Judgment.
MACLENNAN
J.A.

to appeal from the report of the referee is that the questions of interest and costs were decided adversely to him in consequence of the finding of the referee that title to a portion of the estate was only shewn for the first time after the filing of the petition.

I shall deal with this part of the appeal first, and I think it is perfectly clear that the learned Chancellor had no alternative but to refuse the leave, for the reasons which he has given. If the leave had been given, the appeal could have had but one result. It must have been dismissed. The vendor's solicitor thought the report could do him no harm, and he not only abstained deliberately from appealing against it, but consented that the purchaser's appeal from the report, and the hearing of the petition on further directions, should come on together. He took the chance of success on the report as it stood, and judgment passed against him.

It was drawn up and entered of record, and one of its terms was that the report, as amended by consent, was thereby confirmed. After that it was impossible for an appeal against the report to succeed. It was binding on the vendor, not only by the judgment, but by the consent. In order to open up the report, the judgment must first be got rid of, and that could only be done by appeal. If we were ever so well satisfied that the report was wrong, we could not interfere with the order. Nor could we do so even if the judgment on further directions were now vacated. In that case the appellant would have to apply *de novo* under the altered circumstances to a Judge in the Court below, and it would then be competent to him to grant or refuse the indulgence. All that we decide is that as the case stood before the learned Chancellor, his judgment was right. We cannot interfere with it, and that part of the present appeal must be dismissed.

The substantial contest in this appeal, however, is whether, taking the report of the referee as it stands, and assuming it to be right, the order of the 26th of September can be upheld so far as it dealt with the interest on the purchase money, and the costs of the petition and enquiry.

The learned Chancellor did not write any judgment, but as I understand, disposed of the case immediately after the argument, and we have not the advantage of knowing the reasons of his judgment, except as they may be gathered from the terms of the order itself; but I cannot think that if the learned Chancellor's attention had been directed by the counsel, on the argument before him, to the terms of the contract, he would have deprived the vendor of interest on his purchase money.

Judgment.-
MACLENNAN
J.A.

The contract is for the sale of a property encumbered by two existing mortgages amounting together to \$34,000, and the agreement is that this sum, and a further sum of \$9,000 of the purchase money are to remain upon mortgage of the property. The old mortgages which respectively bore date the 1st of January and 1st of July, in some former year, and bore interest, were to be assumed by the purchasers, with interest from the 1st of July, and the new mortgages for \$9,000 were to bear date on the 1st of July and the interest thereon was to run from the same day. Now it is to be observed that although the contract is only made on the 28th of June, the parties deliberately agreed that the interest to be paid by the purchasers was to begin two days afterwards. At the same time, twenty days are allowed for investigation of title. It is quite plain, therefore, that the parties did not intend that the interest to be paid on the mortgages should depend in any way on the time of completion. But not only is the interest to run from the 1st of July, but the rentals, taxes, insurance, municipal rates, and other charges affecting the property, are to be adjusted as of that day, although the payment of the adjusted items is to be made at the date of closing. The only exception is that part of the purchase money which was to be paid in cash, and as to that, it was to bear no interest until the day of payment, which was to be within twenty days from the date of the agreement. But neither has the time fixed for this payment, or the commencement of interest thereon, any relation to the term of completion.

Judgment.

MACLENNAN
J. A.

The contract does not, in reality, fix any time for completion. It merely fixes twenty days as the time for accepting the title. If the title had been accepted on the 20th day, it might have taken some days longer to complete, but that would not extend the time for payment of the cash, or excuse payment of interest if it was not paid on the day.

The case, then, is one in which the parties have by deed fixed the time of payment of the purchase money, and the time from which interest thereon is to be computed, irrespective of the time of completion; and, in my opinion, the interest is thereby made as much a part of the purchase money as the principal.

The judgment has, by postponing the time from which the purchasers are to pay interest, from the 1st of July as to \$43,000, and from the 18th of July as to \$15,000, to the 14th of August, in effect deprived the vendor of a substantial part of his purchase money. The Court has inflicted a penalty upon the vendor, or has made him liable in damages to the extent of several hundred dollars, and to support the judgment it must be made to appear that he has done something for which he ought in law to suffer such a loss, that he has been guilty of some breach of contract or duty, or of some other misconduct, for which the law holds him responsible to the purchasers, and for which they are entitled to compensation.

What, then, is it he has done? The only thing suggested is this: that a good title to an undivided interest in 9 feet of the land was not shewn until the 14th day of August, when a quit claim was for the first time exhibited to the purchasers. This quit claim was not an instrument which was in the vendor's possession or power at or before the 18th of July, but it was procured afterwards at the request of the purchasers, and in order to meet an objection raised by them.

Now, what is the ordinary obligation of a vendor in carrying out a contract of sale? It is to do three things, viz.: to abstract a sufficient title, to verify a sufficient title,

and to give a proper conveyance : Dart's Vendors and Purchasers, 6th ed., p. 725. That is to say : he is to prepare and deliver on request an abstract containing everything that is necessary to shew a good title ; he is then to verify the abstract by the production of the title deeds, and such other proofs and evidences as are necessary for that purpose ; and finally, he is to execute a sufficient conveyance. If the abstract is, or is alleged to be, defective, there may be requisitions upon it until it is made perfect, and so of the proofs, until all is made clear and satisfactory, and it is the vendor's duty to go to all the trouble and expense which may be necessary to make it clear that his title is good. But this ordinary duty and obligation of the vendor may be qualified and varied by agreement. In the present case this was done. By the contract it was covenanted and agreed that the vendor was not to be required to furnish any abstract of title, evidences of title, or copies of the same, other than those in his possession or power ; that the purchasers were to be allowed twenty days to accept the title *at their own expense* ; that all requisitions on title were to be served in writing on the vendor's agent within fifteen days, and time was to be of the essence, and if the purchasers should insist on any objection to title which the vendor was unwilling or unable to remove, the vendor reserved the right to rescind the agreement, and return the deposit.

One or more abstracts were delivered, as I infer from reading the requisitions and answers, and it is evident that the title deeds in the possession or power of the vendor were furnished promptly. The purchasers then, on the 12th of July, within the time provided by the agreement, served a long list of requisitions, some of them pointing out alleged defects in the title apparent on the face of the title deeds, and others calling for proofs and evidences of facts relating to the title. It is probable that the vendor had previously furnished most of the papers in his possession or power, but, however that may be, on the 15th

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of July, the solicitor made a very full answer to the requisitions, referring to papers in his possession, and the report finds, and it is not disputed, that the vendor furnished everything relating to the title in his possession or power. Having done that, by the very terms of the contract he was not to be required to do more. Then what was the purchasers' position? They had got all the abstracts and proofs which the vendor was obliged to give, and they were to have twenty days to accept the title at their own expense. It was for them now to determine what they would do, whether to accept the title as it stood, or to endeavour for themselves, and at their own expense, to clear up matters on which they were not satisfied. I think that was their position. They had three days left wherein to determine what to do. Being now in possession of the title deeds, and as fully in possession of all the facts relating to the title as the vendor, they had the same power and means exactly as he had to make further enquiries and to procure further information. I think the contract meant they were to do that, and to do it at their own expense. There was one question, and as the referee's report finds, only one question to be investigated, and that was whether Mrs. Meredith, who was once entitled to an undivided share in a part of the land, now claimed any interest, or whether a conveyance made by her many years ago, had not effectually conveyed her title. It seems that Mrs. Meredith, when applied to, disclaimed all interest in the land, and executed a release. This could have been procured by the purchasers as readily as by the vendor, but they insisted it was the vendor's duty to procure it. They also insisted on a number of the objections, and they allowed the twenty days to pass without accepting, but not rejecting, the title.

I think the vendor might now have insisted on the stipulation making the time for accepting the title of the essence of the contract, and might have treated the title as rejected, and the contract at an end, but he did not do so. Insisting that he had done all which the contract

required him to do towards clearing up the title, he continued to assist in removing the objections raised by the purchasers, and among other things procured the release from Mrs. Meredith. By this course of conduct, he waived the stipulation making the time for accepting the title of the essence, but that was all. The rights of the parties in other respects continued to be governed and regulated by the contract.

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 J.A.

It was when matters arrived at this stage, the vendor contending that he had done all he was obliged to do, but willing to assist, and the purchasers contending that the vendor should clear up a number of objections including that relating to Mrs. Meredith's interest, that the petition was prepared and filed by the purchasers, and the sole default on the part of the vendor for which he has been deprived of interest is in not having procured on or before the 18th of July the release from Mrs. Meredith.

I am of opinion that, having regard to the terms of the contract, the vendor was in no default whatever, and that it was for the purchasers, if they thought it necessary, to apply to Mrs. Meredith, and to procure the release. I have no doubt the purchasers were not obliged to accept a bad or defective title, and if Mrs. Meredith's claim, or apparent claim, was a fatal defect, they could have required the vendor to remove it, and if he did not do so, they could have rejected the title. But they could not have compelled him to remove it. He had the option, under the special terms of the contract, either to remove the defect, or to say that rather than take the trouble to do so, he would rescind and pay back the deposit. The purchasers did not choose to reject, and the vendor did not choose to rescind, and the end of it was that the objection or defect was removed by getting a release from Mrs. Meredith, and the title was made complete. But I am clearly of opinion that even refusal by the vendor to procure the release or otherwise remove the objection, would have been no breach of contract, or duty, or misconduct on his part, and much less can mere delay be so regarded.

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J.A.

While the judgment complained of deprives the vendor of interest from the 1st of July, it makes no change in the disposition of the rents of the property, which are still to be adjusted as of the 1st of July. So that the judgment puts a double hardship upon the vendor, for depriving him of interest on his purchase money, it yet gives the purchasers the rents of the property during the corresponding period.

I am of opinion that, upon the ground that the vendor had committed no breach of the contract, and had been guilty of no default or misconduct in relation thereto, he could not be deprived of the interest on his purchase money which the purchasers had covenanted to pay, and that in that respect the appeal should be allowed.

We were very much pressed by Mr. Blake with the case of *De Visme v. De Visme*, 1 Mac. & G. 352, as governing this case, but that case cannot now be regarded as authority.

In *Sherwin v. Shakspear*, 5 D. M. & G. 517, the Lords Justices did not follow it, although cited to them, and in *Vickers v. Hand*, 26 Beav. 630, Lord Romilly decided that it had been overruled by *Sherwin v. Shakspear*.

In Fry on Specific Performance, 2nd ed., secs. 1389, 1390, the rule is said now to be that conditions as to the payment of interest "are to have effect given to them according to the natural and literal meaning of their words, except only where there is bad faith, vexatious conduct, or gross negligence—in other words, something amounting to wilful default—on the part of the vendor, disentitling him, in the view of the Court, to the benefit of the stipulation. Therefore delay arising from mere accident, or from something which the vendor could not have guarded against, or from difficulties occasioned by the state of the title, is not enough to exempt the purchaser from the payment of interest in such cases, even though the difficulties may be such as to justify the purchaser in refusing to complete till they are removed. Indeed, it may be said that the insertion of such a condition in a contract shows that the

possibility of delay arising on the vendor's, no less than on the purchaser's, part is from the first contemplated by both parties, and that there can therefore be no hardship on the purchaser in holding him, subject only to the admitted exceptions already mentioned, to the literal performance of the condition;" citing *Herbert v. Salisbury, etc. R. W. Co.*, L. R. 2 Eq. 221; *Sherwin v. Shakspear* 5 D. M. & G. 517, and *Williams v. Glenton*, 34 Beav. 528, and S. C. L. R. 1 Ch. 200.

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J.A.

And in *Dart's Vendors and Purchasers*, 6th ed., p. 722, it is said that later decisions have brought the doctrine back into much the same state as before *De Visme* and *De Visme*, that where there is neither vexatious conduct, dealing in bad faith, nor gross negligence, on the part of the vendor, the special condition containing the expression "from any cause whatever," will extend to delays fairly arising from the state of the title.

The case of *Williams v. Glenton*, L. R. 1 Ch. 200, above referred to, was a very strong one. There was a delay of nine years, because a suit had to be brought to establish the vendor's title, and the purchaser had given notice after the difficulty first arose that he would not pay interest. In the report of the case in L. R. 1 Ch. at p. 206, Knight Bruce, L. J., says: "It has been for several years settled that, as a general rule, the state of the title, and difficulties respecting the title, do not exempt the purchaser from liability to that clause. The vendor may be, in a sense, wrong in not having his title ready at the time specified; but I repeat, it has notoriously been long settled that the mere existence of difficulties as to title justifying the purchaser in refusing to complete until they are removed, does not exempt him from that clause relating to interest. * * There must be, I might almost say, some serious misconduct on the part of the vendor to exempt the purchaser from liability to interest."

The latest case bearing on the question which I have found is *In re Riley to Streatfield*, 34 Ch. D. 386. This was a case under the *Vendors and Purchasers Act*, and

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what was sought was to have it declared that the purchasers were bound to pay interest at five per cent. from the day fixed for completion, there having been considerable delay, and a stipulation for payment of interest, if from any cause, except the wilful neglect or default of vendor, completion was delayed. The purchasers had deposited the money in a bank, and had notified the vendors that it was ready and lying idle there. North, J., held there was no wilful neglect or default, and that the deposit of the money was no excuse, and he observed: "Then it comes simply to this: a contract that the purchaser will pay interest until completion. Why should he be relieved from paying interest, which he has contracted to pay, by the fact that he simply placed the money to his account at his bankers, or even placed it to a separate account, if you please, at the bankers as distinguished from his own account? I do not see how the purchaser can take the matter into his own hands, and put an end to this contract to pay interest by anything he does other than by completing the purchase and paying over the principal."

I think that upon the authorities there would have been no ground for depriving the vendor of interest in this case, even if there had been no stipulation qualifying the vendor's ordinary duty as to shewing a good title, for I think it was the covenant of the purchasers to pay interest from a day named and fixed, irrespective of the time which might be required to investigate the title and to complete the contract, a day long before completion was contemplated or even possible, and no good ground has been made or reason shewn to excuse its performance. I also think the case against the vendor fails for the other reason, namely, that the delay complained of was caused by the state of this title merely, and without any wilful default on his part.

The truth is that contracts for the sale of land vary very much, and so, of course, do the rights and obligations of the parties. The terms of the agreement must govern in every case. If circumstances occur for which no express

provision is made, the Court settles the rights of the parties on principles of justice and equity; but where the parties themselves have made provision, the Court has no right or power to relax or vary the terms of their agreement.

Judgment.

MACLENNAN

J.A.

In the simple case of a sale of a parcel of land for so much money, nothing being said about title, or rents, or interest, the law implies the condition of the vendor having and shewing a good title; and so it is uncertain from the beginning whether it will ultimately be carried out. The title is first to be investigated, and when it is shewn, and not till then, has the time arrived for completion. It is then for the first time that a vendor has a right to receive payment, and that the purchaser is bound to be ready with his money. In the investigation of the title both parties are bound to use reasonable diligence, at the peril of costs and, perhaps, loss of interest. But when a good title is shewn, questions of interest and rent arise, because, in the simple case I have supposed, the effect of the contract in equity is that from its date the purchaser is the owner of the land, and the vendor is the owner of the money. It follows from that that the purchaser is entitled to the rents from the date of the contract, and if he claims and gets the fruit of the land, it is only reasonable that the vendor should get the fruit of the money, that is, interest for the same period. But then all cases are not alike. The land may be vacant, or it may be in the occupation of the vendor, or it may be in the occupation of tenants, or the purchaser may himself be in possession. The law has to apply a just rule in all these different cases. In all cases the purchaser has the option of taking the rents from the date of contract, in the absence of agreement to the contrary, but if he do, he must pay interest from the same date. So, also, if he is in actual possession, he pays interest. If not in possession, he has the option of not paying interest until a good title having been shewn, he gets, or can, if he chooses to take it, get possession: *Dart's Vendors and Purchasers*, 6th ed., p. 711.

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MACLENNAN
J. A.

Then there may be cases in which a time has been fixed by the contract for completion. If everything is ready when that time arrives, the rights of the parties are as above expressed, but if delay is occasioned by the vendor the purchaser will be protected from loss as far as possible by being relieved from the payment of interest; and on the other hand, if the purchaser is guilty of delay, he must pay interest, although out of possession, and although the profits of the land may be little or nothing: *Dart's Vendors and Purchasers*, pp. 708, 709.

But wherever the parties have themselves, by the express terms of the contract, defined what is to be done with regard to the profits of the land and the interest of the purchase money, I repeat that it is not in the power of the Court to alter or vary what they have so settled between themselves, or to make a new agreement for them. The parties have done that in this case, and I think their agreement must prevail.

The appellant also rested his appeal on another ground which, perhaps, ought to be noticed. The statute under which this petition was filed authorizes a summary application to the Court "in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of, or connected with, the contract (not being a question affecting the existence or validity of the contract)." The petition makes no case, and asks no relief, in respect of interest, or damages, or compensation for delay, and merely asks that the vendor be directed to remove certain specified objections to the title. The order of reference, too, merely directs an enquiry whether the vendor can make a good title, and if so, when it was first shewn. I think the vendor ought not to have been deprived of interest without a case being made for it, and without his having an opportunity of meeting it, and defending himself against it; and that the question of depriving the vendor of interest was in reality not properly before the learned Chancellor for decision.

It follows, I think, from the conclusion to which I have

come on the question of interest that the appellant is also entitled to succeed on the question of costs, and that he ought to have the whole of the costs, both of the petition and of the reference.

Judgment.
MACLENNAN
J.A.

It is necessary, however, to say a word as to the costs referred to in the judgment, of the requisitions in relation to the street called Piper Street, and the strip of land adjacent thereto. There is no mention of this in the report of the referee, but as explained to us in the argument by the counsel on both sides, I think the objection raised in respect of that street was altogether without substance, and no exception should be made of the costs of it. The sale is of certain lots on plan 52, extending 185 feet more or less from Wellington Street to a street called Piper Street. The plan referred to is produced from the registry office, and appears to have been registered on the 8th of April, 1853. It was prepared and registered by and on behalf of the then owners of the land, and it shews an allowance for a street fifty feet wide, at a distance from Wellington street of 185 feet, 6 inches. The allowance for street is distinctly marked on the plan, with the word *street* in large letters. I think that plan so prepared, marked and registered by the owners of the land, is sufficient evidence of dedication to make the allowance a highway, and also sufficient evidence that the parcels contracted to be sold actually extend to Piper Street, as shewn on the plan, although the street, as at present opened and used, appears to lie a foot or two further south.

The order of the 26th of September will, therefore, be varied by giving the vendor interest on his purchase money, according to the terms of the contract, and also the whole of the costs of the petition, and the reference.

The appeal should be allowed with costs, except so far as they have been increased by the appeal from the order of the 8th of October, which latter appeal is dismissed.

Judgment. OSLER, J.A. :—

OSLER
J.A.

It is evident that the petition under the Vendors and Purchasers Act did not raise any question as to the right to interest, or the time from which the purchasers should assume or be liable for it. Nor do I see that there was any consent by either party to the question being taken up and disposed by the learned Chancellor at the hearing on further directions, so as to bar the right of appeal. The now respondents seem to have urged before him that, as it appeared from the Registrar's report that a good title was not shown until the 14th August, they should be excused from paying interest earlier than that date, at all events.

The now appellant said nothing about the interest, but ineffectually attempted to attack the report. It was properly held that it was not open to him to do so, because he had not appealed from it. Then, instead of applying at that stage to postpone the hearing, and for leave to appeal, or to enlarge the time for appealing, he suffered judgment to be pronounced, and the order on further directions to be drawn up and entered, and applied afterwards for that relief. It was then too late, and on that ground his appeal from the order refusing to extend the time for appealing must be dismissed. But if, on the purchaser's appeal, the case had been presented to the learned Chancellor as it has been argued to us, I think the direction as to interest would probably not have been made. It appears to me that the petition submitted no question upon that point, and consequently that it was not before the Court for decision. Assuming, however, that it was, I must, with all respect, hold that the rights of the parties are governed by the contract. The purchasers expressly agreed to assume all interest upon the mortgages subject to which they bought, after the 1st of July, 1889, and it is a clear implication from another term of the contract that they were to pay interest on that part of the purchase money which is payable in cash, from the 18th of July, 1889. That was the bargain between the parties, and I think it is manifest that it was

not their intention that the purchasers' liability to assume and pay interest from those dates should depend upon the title having been made, and their acceptance of it at the latter date, or rather at the date of the 20th of July, for it is most significant that interest is to run before the term fixed for the completion of the contract.

Judgment.

OSLER
J. A.

I think we must take the settled rule to be as stated in such text books as Fry on Specific Performance, sec. 1389; and Dart's Vendors and Purchasers, 6th ed. pp. 719, 722; viz.: that the contract, where it contains a stipulation or condition as to interest, governs and must be adhered to, unless there has been something like wilful default on the part of the vendor, disentitling him to the benefit of the stipulation.

The onus of proving that must be on the purchaser. The Registrar has not so found or reported, and if we look at the proceedings behind the report, we see that there was nothing like wilful default. On the contrary, although the Registrar reported, in effect, that a good title was not shewn to a small strip of 9 feet in width on one of the parcels before the production of the Meredith quit claim on the 14th of August, 1889, we see that the report must have proceeded upon some extraordinary misapprehension or oversight, and that it was wholly unnecessary to have produced that quit claim at all, and that the vendor's title was shewn to be good on the answers to the requisitions independently of it before the day fixed for completion of the contract. This was so clear that the respondents' counsel did not attempt to argue to the contrary, urging merely that we could not go behind the report, as there was no appeal therefrom by the vendor, and that the quit claim should have been registered before the title made under it was complete. I do not wish to hold that for a purpose of this kind, *i.e.*, the disposition of the interest and costs, the proceedings may not be looked at. I am inclined to think that they may, and ought to be. But even if not yet by the terms of the contract the quit claim was something which the vendor was not bound to

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produce. Its omission did not justify the purchasers in filing the petition, for by the terms of his contract, the vendor was not bound to furnish any abstract or evidences of title, or copies, other than those in his own possession or power. The procuring of the quit claim was, therefore, a gratuitous act on his part, even if it had been necessary to complete the title, for in that case, if the purchasers did not take the title without it, their right was to reject it, not to compel the vendor to complete it. Under such circumstances, having got the quit claim, it clearly was no part of the vendor's duty to go further and register it. The appeal must, therefore, be allowed. I at first doubted whether we could interfere with that part of the order appealed from, which directs each party to bear his own costs of that part of the proceedings relating to Piper Street, but on reflection, I think we may properly do so, because, as my learned brother MACLENNAN, has pointed out, the terms of the purchasers' contract, in effect, precluded them from putting the vendor to any costs of a petition under the Act. That should have dominated the whole of the proceedings and so, on principle, the vendor was wrongly ordered to bear any part of the costs.

The principal appeal must, therefore, be allowed, with costs. The appeal from the order refusing leave to appeal must be dismissed with any costs which have been specially occasioned by it.

HAGARTY, C. J. O., and BURTON, J. A., concurred.

Appeal allowed with costs.

REGINA V. COUNTY OF WELLINGTON.

Constitution allow—"British North America Act"—"Bankruptcy and Insolvency"—"Banking and Incorporation of banks"—"Property and Civil Rights"—Crown—Taxation—Tax sale—R. S. O. (1887) ch. 193, sec. 7, sub-sec. 1.

Certain lands, after the grant from the Crown, became by certain mesne conveyances the property of the Bank of Upper Canada, and upon the failure of that bank were conveyed to its trustees, and were subsequently, with the other assets of the bank, vested in the Crown by 33 Vic. ch. 40 (D.) The Crown then sold them and the purchaser gave a mortgage back to secure part of the purchase money. The mortgage contained the usual provision for payment of taxes, but the taxes were not paid and the lands were sold, this action being brought to set aside the tax sale :—

Held, per HAGARTY, C.J.O., and OSLER, J.A., that the Act, 33 Vic. ch. 40 (D.), was *intra vires*, as dealing with "Bankruptcy and Insolvency" or "Banking and Incorporation of Banks." That the lands were therefore properly vested in the Crown as trustee, and that the interest of the Crown as mortgagee and trustee could not be sold for arrears of taxes, but was exempt under R. S. O. (1887) ch. 193, sec. 7, sub-sec. 1 :—

Per BURTON, J.A. That the Act was *ultra vires* as an interference with "Property and Civil Rights in the Province" and that the lands remained in the trustees subject to taxation. That even if the Act was *intra vires* still the lands, being vested in the Crown in the place and stead of the trustees voluntarily selected by the shareholders of the bank, were not exempt from taxation :—

Per MACLENNAN, J.A. That the Act was *ultra vires* and the lands subject to taxation, but that, upon the evidence, the sale was fraudulent and void as far as the interest of the Crown was concerned.

The judgment of the Queen's Bench Division, 17 O. R. 615, was therefore affirmed, BURTON, J.A., dissenting.

THIS was an appeal from the judgment of the Queen's Statement. Bench Division, reported 17 O. R. 615.

The lands in question in this action, after the grant from the Crown, became by certain mesne conveyances the property of the Bank of Upper Canada and by 33 Vic. ch. 40 (D.), were vested in the Crown upon certain trusts set out in that Act. Subsequently the lands were sold by the Crown to the defendant John Anderson, who by indenture dated the 28th of February, 1877, mortgaged the lands to Her Majesty the Queen to secure \$1,701, part of the purchase money, the mortgage containing the usual covenant for payment of taxes by the mortgagor. On the 27th of January, 1886, judgment for redemption or sale of the lands was obtained in an action brought in the Chancery Division of the High Court of Justice by the mortgagee against

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the defendant, John Anderson, and on the 4th of December, 1886, a final order for sale of the lands was made. It appeared, however, that on the 13th of October, 1885, the Treasurer of the county of Wellington, assuming to act under the warrant of the Warden of the county, had sold the lands in question to the defendant Cutten for certain arrears of taxes for the years 1882, 1883 and 1884, alleged to be due in respect thereof. In pursuance of this sale the lands had been conveyed to the defendant Cutten who had subsequently conveyed them to the defendant Quirt, and Quirt had executed a declaration of trust in favour of the defendant Emily Anderson, wife of the defendant John Anderson, and had also sold and conveyed a small portion of the land to the defendant McFadden. The plaintiff then brought this action, alleging [that the defendant John Anderson, with intent to defraud the plaintiff, had allowed the taxes to become in arrear and the land to be sold and had procured the defendant Cutten to buy the land in for the benefit of the defendant Anderson, and that the whole transaction was a mere scheme to carry out this fraudulent intent, and the plaintiff asked that the tax sale might be declared null and void and that the subsequent conveyances might be set aside and cancelled and that it might also be declared that the mortgage was a valid and subsisting first charge or lien upon the land. It was also contended that the lands were exempt from taxation and that the tax sale was void. The defendants denied all charges of fraud and collusion and insisted that the tax sale was regular and valid and the defendant McFadden alleged that he was a *bonâ fide* purchaser for value without notice.

The action was tried before ROBERTSON, J., at Toronto, at the Spring Sittings of 1889, and judgment was subsequently delivered in favour of the plaintiff declaring that the tax sale was null and void, and that the several deeds from the Warden and Treasurer of the county of Wellington to the defendant Cutten, and from him to the defendant Quirt, and from Quirt to McFadden, were null

and void, and should be delivered up to be cancelled, and that the mortgage was a good, valid, and subsisting lien on the lands in question. Statement.

Upon appeal to the Divisional Court, this judgment was varied by declaring that the sale was valid as far as the interest of the mortgagor in the land was concerned, but in other respects the judgment was affirmed. In the Divisional Court the objection was for the first time taken on behalf of the defendants that the Act, 33 Vic. ch. 40 (D.), was *ultra vires*, and that the Crown had no title whatever when the lands were granted to Anderson.

The defendants appealed, and the appeal came on to be heard before this Court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 6th of March, 1890.

Bain, Q. C., and *Kappele*, for the appellants. The Crown had no title whatever to this land at the time of the grant to Anderson. After the failure of the Bank of Upper Canada all its assets, including this land, were conveyed to trustees. These trustees were incorporated and the conveyance to them ratified by 31 Vic. ch. 17 (D.), but the title of the trustees was complete without this Act. By the Act 33 Vic. ch. 40, (D.) however, the lands held by these trustees are vested in the Crown and as no conveyances were obtained from the trustees to the Crown the whole title of the Crown depends upon the validity of the Act. This Act the defendants say is *ultra vires* because it deals with "Property and civil rights in the Province" and trenches therefore upon the exclusive jurisdiction of the Provincial Legislatures. In the Court below it has been supported as dealing with "bankruptcy and insolvency" or "banking," but we contend that it cannot be upheld under either of these heads.

Parliament has, of course, power to pass general insolvency or bankruptcy laws but we submit that it cannot pass insolvency or bankruptcy laws restricted in application to a particular class and *a fortiori* not to one individual in a particular class. But even if Parliament could do this, this Act is not

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an Act dealing with insolvency or bankruptcy at all. The bank was already in insolvent circumstances and its assets had been transferred to trustees for its creditors and this Act is an attempt to take the property out of the hands of these trustees and place it in the hands of the Crown. Clearly the Act deals with property and civil rights within the Province and is invalid: *Cushing v. Dupuy*, 5 App. Cas. 409; *L'Union St. Jacques v. Bélisle*, L. R. 6 P. C. 31. It is contended that because the bank had certain assets in the Province of Quebec Parliament had jurisdiction and that the jurisdiction of the Provincial Legislature was excluded and *Dobie v. The Temporalities Board*, 7 App. Cas. 136, is relied on in support of that contention. But that case is distinguishable. There the trust in question was on its face one affecting the Church in the whole Dominion, and the Provincial Legislatures attempted to vary the provisions of a former Act of the Province of Canada.

The appellants also submit that with regard to "banking," the powers of Parliament relate to general banking laws and laws for the creation of banks and the issue of money, and that if a bank becomes insolvent it then becomes subject to any general bankruptcy or insolvency law that may be in force but cannot be dealt with as a bank under the powers given to legislate as to banks and banking.

Assuming, however, that the Act is valid and that the property was vested in Her Majesty by it, still we contend that it was not exempt from taxation, so that the tax sale was valid. To be exempt from taxation, the land must be held by the Crown either beneficially or in trust for Indians: R. S. O. (1887), ch. 193, sec. 7, sub-sec. 1. It cannot be contended that all property held by the Crown in trust is to be exempt from taxation, because then it would not have been necessary to specifically mention property held in trust for Indians. Here the Crown admittedly were creditors of the bank, and to that extent may be said to have had some interest in the assets of the

bank, but that is very far from saying that the property ^{Argument.} was held by the Crown beneficially. The Crown was merely trustee for itself and other creditors, though it would, with the other creditors, be beneficially interested in the proceeds. The British North America Act expressly recognizes the right of the Provinces to tax all lands except those belonging to Canada, which must mean the lands belonging to the Crown beneficially, and the exemption in the Assessment Act is intended to have merely this effect.

J. R. Cartwright, Q. C., for the Attorney-General for Ontario, argued on the same lines as the learned counsel for the appellants, referring in detail to the peculiar provisions of the Act of 1870, more particularly to those relating to the mode of executing and registering conveyances, &c.

H. D. Gamble, and *H. L. Dunn*, for the respondent. The power to pass the Act in question must have been either in Parliament or in the Provincial Legislature. It could not have been in the Provincial Legislature because the Act deals with assets outside the Province, and with subjects which certainly as far as general legislation in regard to them is concerned, clearly belong to Parliament. How can it be contended that where there is general power to deal with a particular subject matter, legislation dealing with an individual in regard to that subject matter is invalid? Every Act for the incorporation of a bank is a special piece of legislation. So is every Act granting a divorce. The general power must include the special power. If Parliament has power, as admittedly it has, to pass an Act incorporating a bank, it must surely have power to pass an Act winding that bank up. Otherwise the creature of Parliament would be independent of its creator. At the time the Act in question was passed, there was no general Act in force providing for the winding up of banks, and this is merely a winding up or insolvency Act, restricted as far as its application is concerned to the particular bank that required at the time to be dealt with.

After the lands in question, and the other assets of the

Argument.

bank, were vested in the Crown, the Crown advanced \$250,000 to pay off creditors' claims and thereby really became the purchasers of the assets of the bank so that in fact the property in question was held by the Crown beneficially. Even if it was not held beneficially but only held by the Crown as trustee, it was not subject to taxation, and the tax sale was invalid: *B. N. A. Act*, sec. 125; *R. S. O.* (1887), ch. 193, secs. 137, 159, 171, 189; *Leprohon v. City of Ottawa*, 40 U. C. R. 478, 2 A. R. 522; *Church v. Fenton*, 28 C. P. 384, 4 A. R. 159, 5 S. C. R. 239; *Regina v. Williams*, 39 U. C. R. 397; *Attorney-General v. Midland R. W. Co.*, 3 O. R. 511; *Regina v. Guinness*, 3 Ir. Ch. R. 211.

At all events, it is clear on the evidence that this transaction was a scheme on the part of Anderson to defeat the mortgage, and therefore it should be held that the mortgage remains unaffected. Clearly Anderson himself cannot object to the title of his grantor and mortgagee.

Bain, Q. C., in reply.

May 13th, 1890. HAGARTY, C.J.O.:—

I think it was within the power of the Dominion Parliament to pass any Act, in substance, to facilitate the winding up or settlement of the affairs of an insolvent bank.

When the two Acts in question were passed there was no general Winding-up Act in existence, and I consider they fell clearly within the general subject of "Banking, incorporation of banks, and the issue of paper money."

The subject of "Bankruptcy and Insolvency" may be also referred to. The 91st section of the British North America Act declares that the exclusive jurisdiction of Parliament extends to all matters coming within the classes of subjects next hereinafter enumerated.

I am unable to understand how any legislation as to the administration of the assets of a suspended bank, their collection and distribution, the payment of creditors and provisions as to shareholders &c., &c., must not be held to

be within such jurisdiction and necessarily outside the jurisdiction of a Provincial Legislature.

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HAGARTY
C.J.O.

The first Act of 1867 confirmed the trust deed, stating it to have been executed while the charter was in full force, adding several provisions to it, such as (section 5, sub-section 1,) to carry on or continue so much of the operations of the bank as may be necessary for the beneficial winding-up of the same, and with power to use the bank's name, when necessary, for the winding-up; (sub-section 5,) no dividend to be paid to creditors till sanctioned by the Governor-in-Council.

Power is also given to the Governor-in-Council to nominate trustees in certain cases.

Sub-section 16 reserves the rights of the Crown against the bank, or against trustees, or the estate, or the shareholders, and the shareholders' liabilities are to be unaffected.

The Act of 1870 recites the insolvency of the bank, and that in the interest of the Dominion, which was by far the largest creditor of the bank, and of all parties concerned, provision should be made for a more speedy disposal of the property, and for making a fair and equitable adjustment and settlement of the claims of creditors; and then the assets are transferred to Her Majesty, to be administered under the Governor-in-Council, who is empowered to make any abatement in the claim of the Dominion.

The Act of 1871 (34 Vic. ch. 8,) allowed an appropriation of \$250,000 to pay off claims on the bank, settled and adjusted under section 4 of the Act of 1870.

As already noticed, there was no general Winding-up Act in existence.

In the same session a general Banking Act was passed: (34 Vic. ch. 5.) Section 57 declares that any suspension of specie payments for 90 days constitutes a bank insolvent, and operates as a forfeiture of the charter as to the issue of notes and the carrying on of other banking operations, the charter remaining in force only for the purpose of enabling the directors or assignee, or other legal authority

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HAGARTY provided), to make calls and wind up the business.
C.J.O.

Section 70 provided that the bank should be subject to such provisions of any general or special Winding-up Act to be passed by Parliament as may be declared to apply to banks, and no special Act which Parliament may deem it right to pass for winding up the affairs of the bank, in case of its insolvency, shall be deemed an infringement of its rights or privileges conferred by its charter.

The first Winding-up Act, 45 Vic. ch. 23, (D.) 1882, is declared applicable to banks "which are insolvent or in process of being wound up either under a general or a special Act."

I refer to this later legislation merely to show the apparent understanding of Parliament as to its powers to legislate as to insolvent banks.

I consider the legislation as regards the Bank of Upper Canada to be in the nature of special winding-up process, and that such legislation was *intra vires*, and ranging under the head of "Banking and incorporation of banks," and that it was *ultra vires* of any Provincial Legislature.

It perhaps may be objected that such special legislation may be faulty. I hardly see this, where the special legislation is in reference to settling the affairs of an institution wholly the creation of Parliament, and wholly outside the creative powers of the Provinces.

The distribution of its assets,—the peculiar liabilities of shareholders,—the large claims of the General Government,—the advancement of moneys by Parliament to assist the liquidation,—the power given to the Governor-General in Council to remit or vary the government claim,—all point to the subject of "banking" as clearly as if it had not become unable to meet its engagements.

In 1868, the year after the first statute, the Ontario Registry Law, 31 Vic. ch. 20, sec. 55, (O.) permits the registration of the deed to the trustees of the suspended Bank of Upper Canada, confirmed by the Act of the Parliament of Canada, 31 Vic. ch. 17, and gives a form for

registering—shortly stating the assignment, and that the trustees held as a corporation under the Act of the Dominion.

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HAGARTY
C.J.O.

As a matter of "Banking and incorporation of banks," and also as a matter of "Bankruptcy and Insolvency," I am of opinion that the legislation was within the exclusive powers of the Dominion Parliament.

On the other points of the case, I agree with the opinion of my brother Osler.

BURTON, J. A. :—

The point mainly insisted upon in the argument in this Court was that the Act of the Dominion Parliament transferring the lands in question from the trustees in whom they had been vested under the assignment made by the Bank of Upper Canada for the benefit of creditors was within the competency of that Parliament.

That legislation, it will be seen, took place very shortly after the Confederation Act and before those portions of that Act which relate to the distribution of legislative powers had received the consideration and attention which has subsequently been bestowed upon them. The question is undoubtedly of importance, not because a large amount of property has been sold and disposed of under the provisions of the Act, as no inconvenience is likely to result to purchasers, whatever may be the decision—partly by lapse of time and the titles being quieted by the Statute of Limitations, and partly by the fact that there is no one to initiate proceedings against them, but on the further ground that no doubt can exist that the Government and Legislature having power to deal with the question would if necessary pass such validating Acts as would confirm all such titles,—but it is of the utmost importance that the lines of demarcation between the powers of the respective Legislatures should be strictly drawn and defined.

Let us see then, how matters stood at the time when the Confederation Act came into operation.

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BURTON
J.A.

The bank which had been in existence since 1819 had its charter renewed by an Act of the late Province of Canada in 1856, which charter was to continue in force until 1870, its chief place or seat of business being at the city of Toronto.

It was, *inter alia*, provided by the charter that a suspension for 60 days of payment on demand in specie of the notes or bills of the bank should operate as and be a forfeiture of its charter.

The bank suspended payment on the 18th of September, 1866, and within the sixty days allowed by the charter for resumption made an assignment for the benefit of creditors, and this assignment, so far as it could be confirmed, was confirmed at a special general meeting of shareholders.

The deed contains a recital of the bank being unable at present to meet their circulation and deposits, as well as their other indebtedness in specie, although possessed of assets more than sufficient to pay all their liabilities, if properly managed and applied, and was acted upon by the trustees named in it, and was being carried out at the time of Confederation; and if that deed offended against any of the provisions of the Act then in force in Upper Canada, respecting fraudulent preferences by persons in insolvent circumstances, it could have been impeached by any creditor of the bank; and I apprehend that after Confederation that Act, which still remained, and has subsequently been re-enacted with amendments in force in Ontario, would have been the Act by which its validity or invalidity would have been ascertained, there being no law of bankruptcy or insolvency then in force relating to banks.

This, then, being the state of affairs, the Dominion Parliament, on the 21st of December, 1867, passed an Act which, after reciting these facts, proceeded:

First, to confirm this deed of assignment; then to make the trustees named in it a body corporate, and to vest the property in them.

It then provided that, contrary to the law then prevailing in Ontario, it should not be necessary to register the deed, but it should be valid without registration, and if the trustees elected to register, they might do so in a certain form, and then proceeded to provide for the appointment of trustees from time to time.

Then followed certain special provisions, and the Act provided that where these provisions conflicted with any provision in the original deed, effect should be given to the former. It is not, perhaps, very easy to understand what the first of these provisions meant, seeing that the right of the bank to carry on the operations of the bank had ceased in 1866, and the provisions in the deed were ample to allow the trustees to extend the time for payment of any debts due to the bank.

Then they were authorized in the name of the bank to execute deeds, receipts, and other documents.

Most of the other provisions do not seem to me to be material, but by the 14th provision the rights of the creditors and shareholders are interfered with to a serious extent.

The original charter of the bank made no provision for winding up the affairs of the bank by an assignment, and so far as this Act supplied that deficiency by confirming the act of the board in making it, I apprehend that the Dominion Parliament was the proper body to pass that legislation, and this Act, therefore, does not seem to me to be open to objection.

On the 12th of May, 1870—that is to say about 4 months after the bank charter would, if there had been no previous forfeiture, have expired by effluxion of time—the Dominion Parliament passed an Act, 33 Vict. c. 40, containing a recital somewhat at variance with that made in the deed of assignment that the assets were ample, if properly managed, to pay all the liabilities, viz. declaring that they are wholly insufficient to meet the liabilities of the bank; and then proceeded to transfer and vest in Her Majesty from the 1st of August then next, all the assets and property

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of the bank held and possessed by the trustees under the deed in question, or acquired by them subsequently, and all the powers, authorities, rights, and immunities vested in or conferred on the trustees were transferred to the Governor-in-Council, and many of the sections of the previous Act were repealed, and the Governor-in-Council was empowered to sell and dispose of the property, estate, and effects, thereby vested in Her Majesty, either generally or to creditors in satisfaction of their claims, and generally to compromise and adjust all claims due to, or payable by, the bank.

The obligation to publish a balance sheet was annulled, and power was given to convey the property without affixing the Great Seal or any seal.

If this legislation is *intra vires*, it is claimed to be so, either under sub-section 15 or sub-section 21 of section 91 of the British North America Act. The Court below, in holding that it was *intra vires*, placed their decision upon the latter of these, which relates to bankruptcy and insolvency. With the very greatest respect, I am unable to see how it is warranted under either.

At the time of the passing of the later Act the charter had absolutely expired.

The laws which the Dominion has power to pass under sub-section 15 were laws relating to "Banking, the incorporation of banks, and the issue of paper money."

The first and third of these it is hardly necessary to say can have no possible application or relevancy and although it may be conceded that the Dominion had the power to re-grant a charter to this defunct institution it had not the remotest idea of doing so.

Then as to the others—laws relating to "Bankruptcy and Insolvency."

I do not enter into the question, somewhat discussed at the bar, as to whether the power given being general, the Dominion Parliament instead of passing a general law dealing with the subject of the administration of estates of persons who may become bankrupt or insolvent accord-

ing to certain rules and definitions, including, as was remarked in *L'Union St. Jacques v. Bélisle*, L. R. 6 P. C. 31, "the conditions in which that law is to be brought into operation and the effect of its operation," were empowered to pass a law affecting only a particular firm who were in embarrassed or insolvent circumstances and making a special bankruptcy law applicable to that particular firm. It is not necessary to speculate upon that question as it is sufficient to say that such a contingency is to the utmost degree improbable and no such legislation has been attempted in the present case.

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BURTON
J.A.

There was no general law, either at the time of the assignment or at the time of the passing of the Act, relating to bankruptcy or insolvency, and the bank, being in embarrassed circumstances, claimed to have the right at Common Law to make an assignment, being restricted as they supposed, rightly or wrongly, only by the provision of the Act, to which I have referred, prohibiting any such assignment if it contained any preferences of one creditor over another.

That assignment was made and that was what was dealt with by Parliament in the Act of 1870.

If that Act be valid, I can imagine no case in which similar legislation would not be justified in the case of any partnership or firm or individual who have or has made an assignment for the benefit of their or his creditors. The fact that the embarrassed debtors happened to be a bank, and the Dominion the largest creditor, cannot, in my view, make any difference under the circumstances which I have mentioned.

The property was transferred to trustees by an assignment made voluntarily; the validity of that assignment, in the absence of a bankruptcy law, had to be governed by the laws in force in the Province, being a question falling within the subject of property and civil rights and not under any of the matters mentioned in section 91. As remarked by Mr. Blake, in a case recently before this Court, neither the general nor the local Legislature can

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attract to "itself a jurisdiction in matters assigned exclusively to the other power by the device of in one case enlarging, or in the other restricting the geographical area or condition in respect of which it proposes to legislate."

Mr. Justice Street in his judgment, says: "The Act seems to contain the essential elements of insolvency legislation—it recites the insolvency, vests the estate of the insolvent in the Crown as trustee for the creditors, and provides for the realization thereof in order that the debts may be paid."

I quite agree with my learned brother that, if the case falls within the category of bankruptcy and insolvency, the Dominion Parliament can alone deal with it. The divergence of our views arises from my regarding this as not a case of that kind at all.

I pointed out in the case of *Edgar v. The Central Bank*, 15 A. R. at p. 197, the distinction which, in my opinion, existed between that class of legislation and legislation having for its object the securing of an equal distribution of the assets of a debtor in insolvent circumstances where no bankruptcy law existed.

Although there was a difference of opinion in this Court as to the effect of some of the clauses introduced by amendment to chapter 118 of the Revised Statutes of Ontario (1877), being the Act respecting the fraudulent preference of creditors by persons in insolvent circumstances, we were unanimous in holding that the Act itself, as originally passed, was within the exclusive jurisdiction of the Legislature of the Province, as I think any legislation in reference to this assignment of the bank—with the sole exception to which I have referred of the power to validate the act of the board in making it—was within the exclusive legislation of the Province. If, for instance, it offended against any of the provisions of chapter 118, that Provincial Legislature, and that alone, could validate it.

Whilst I am free to admit that the Dominion Parliament might, by a bankruptcy or winding up Act, have declared that such an assignment was an act of bankruptcy under

which a Court of its creation might have proceeded to declare it liable to compulsory liquidation, they have not attempted to do so. On the contrary, they have assumed to validate and confirm that assignment, have incorporated the trustees, and then by a subsequent enactment have assumed to transfer the property so vested under the deed to Her Majesty, or in other words to the Dominion authorities. They have first interfered with the rights and remedies of the creditors against the trustees individually by giving them a corporate existence, and then, by vesting the lands conveyed to them by the deed in the Sovereign, against whom the better opinion would seem to be that the trusts could not be enforced.

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BURTON
J.A.

But the legislation has no connection with bankruptcy and insolvency, as those terms are understood.

A suggestion has been made by one of my learned brothers that the case may be governed by the decision of the Privy Council in *Dobie v. The Temporalities Board*, 7 App. Cas. 136. The point was not argued and I think it will be found to have no application. It may be conceded at once that neither the Province of Ontario, nor Quebec, nor both combined, could, if the bank had existed after Confederation, have passed any legislation the effect of which would be to modify or repeal the provisions of the bank's charter.

The powers conferred by the British North America Act upon the Provincial Legislatures of Ontario and Quebec, to repeal and alter the Statutes of the old Province of Canada, are made precisely co-extensive with the powers of direct legislation with which these bodies are invested by the other clauses of that Act.

The Province having no power to charter banks, can have no power to interfere with charters granted by the former Province, but the bank, (and for this purpose it is immaterial whether it was before or since Confederation) made an assignment for the benefit of creditors. How far the board with the authority of a majority of the shareholders could legally make such an assignment, has been

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much discussed, more especially in the Courts of the United States; but as the Dominion Parliament might have provided for this in the original charter, they could, I think, as I have pointed out, grant the power or confirm the act of the board as was done by the Act of 1867; on the other hand, if that assignment had offended against the provisions of chapter 118, the Legislature of the Province had alone power to cure such a defect. I quite agree that their having validated it, would not stand in the way of the Dominion Parliament stepping in and declaring it an Act of bankruptcy; but the Legislature having to deal with property and civil rights, could alone transfer the property from one set of trustees to another.

For these reasons I am of opinion that this legislation was *ultra vires*.

But assuming it to be valid, I am not at all prepared to concede that the property, being vested in Her Majesty in the place and stead of the trustees voluntarily selected by the shareholders, was less liable to taxation than it would have been originally. If otherwise, it furnishes, perhaps, the strongest argument that I have yet referred to against the validity of the Act of Parliament, as it is manifest from the evidence in this case that many thousands of acres of land in Ontario, which were subject to assessment for the benefit of the municipalities, have been rendered free from taxation without the consent of the Ontario Government and Legislature, which has the exclusive power to deal with those subjects.

The general principle is well expressed by Chief Justice Marshall when he says: "It is, we think, a sound principle that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates:" *United States Bank v. Planters Bank*, 9 Wheat. 904.

In *Briscoe v. The Bank of Kentucky*, 11 Pet. at p. 323, it was stated that the State of Kentucky was the exclusive stockholder in the bank, and the question was as to the effect of that position, and it was answered by the extract I have given from Chief Justice Marshall's judgment.

Judgment.
BURTON
J.A.

I do not at all question the general principle that the Crown is not bound by a statute unless expressly named in it. When, therefore, our Assessment Act declares that all estate real and personal in Ontario shall be liable to taxation it would clearly not include any lands vested in Her Majesty by virtue of her prerogatives or for any public purposes. Sub-section 1 of section 7 was not necessary therefore for that purpose, but when we find that the sub-section goes on to exempt also certain lands held in trust for Indians it is not an unreasonable inference that in cases where the Crown is neither personally concerned nor the public interest involved, but where Her Majesty's name is used solely in the place of another trustee for private persons that the principle referred to by Chief Justice Marshall should be held to apply.

The matter has been considered in two cases in our own Courts.

In the first of these, a judgment, not a considered judgment, was given at the close of the argument by the late Chief Justice Harrison and this was followed by the present Chancellor in *Attorney-General v. Midland R. W. Co.*, 3 O. R. 511, who, however, not only followed but approved of the former decision. I incline to think both judgments correct. In those cases Parliament had vested in the Crown, almost as a department of the Government, the Provincial University and its estates, and the decision is no authority for holding that this sub-section of the Assessment Act is to receive the construction contended for. There are expressions no doubt to be found in some of the cases and especially in some of the Irish cases which will warrant it, but some of those leaned upon the construction of particular statutes. It not being necessary in my view of the case, I abstain from any expression of opinion upon this point and I refer

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to it chiefly with the view of illustrating how such an Act as the one in question would interfere with property and civil rights by depriving the municipalities of their means of raising a revenue from these lands which are to all intents and purposes the lands of private individuals. The reference to section 125 of the British North America Act does not help the respondents, as this land never did belong to the Dominion.

I think the appeal should be allowed and the action dismissed.

OSLER, J. A. :—

The plaintiff's case is : (1) that as against the Crown, the land was not assessable, and therefore that the tax sale is void ; (2) that even if the taxes were lawfully imposed, the sale was brought about by Anderson himself in fraud of the Crown in order to defeat his mortgage, and that his wife Emily Anderson, in whose favour the defendant Quirt executed a declaration of trust, is really his nominee, and that he is still the beneficial owner, subject to the mortgage.

As far as I am concerned, I think the case turns upon the first point, in answer to which the defendants allege : (1) that the Dominion Statute of 1870, vesting the land in the Crown, was, and is, *ultra vires* the Parliament, so that the Crown having acquired no title from the bank, and having none under the Act, could confer none upon Anderson, the result being that the land, as land already granted, always remained taxable ; (2) that even assuming the Crown's title good under the Act of 1870, yet that land so acquired or held as mortgagee, following a subsequent grant, being held merely as trustee for creditors of the bank, and not as ordinary public lands of the Crown are held, were and are taxable under the Assessment Act as lands of private persons are taxable.

The first question then is, as to the title under which the Crown conveyed to Anderson.

The Bank of Upper Canada was incorporated by the Act, 59 Geo. III. ch. 24, and the various Acts relating to it were afterwards amended and consolidated by an Act of the late Province of Canada, passed in 1856, being 19 & 20 Vic. ch. 121. It then became, if it had not previously been, a corporation authorized to carry on a general banking business throughout the old Province of Canada, now constituting the Provinces of Ontario and Quebec, and as is well known, its business was so carried on, though the head office was in Toronto.

Judgment.

OSLER
J.A.

The principal question involved in the case is of considerable importance, affecting as it does the title to the greater part of the lands which have been sold in the course of winding-up the affairs of the bank, and it is necessary to refer briefly to the main provisions of the two Acts of the Dominion Parliament under the authority or assumed authority of which this was done.

The first of these is 31 Vic. ch. 17, passed December, 1867, in the first session of the first Parliament, and entitled an "Act for the settlement of the affairs of the Bank of Upper Canada."

The preamble of this Act recites that the bank on the 18th of September, 1866, suspended specie payments, and afterwards, on the 12th of November, 1866, while its charter and powers were in full force, made an assignment under its corporate seal, to certain trustees in the deed named; that at a special meeting of the shareholders the deed was confirmed, and that the then trustees had requested that the deed should be confirmed, and the trustees incorporated under the name of "The Trustees of the Bank of Upper Canada." The first section of the Act confirms the deed of assignment, which is set forth as a schedule to the Act. The second incorporates the trustees as in the deed and in the Act named and appointed by the name above-mentioned, and enacts that they shall, under that name, hold all the estate of the bank, and have in their corporate capacity all the powers conferred upon them by the deed and by the Act. Section 4 provides for the appointment and nomina-

Judgment. tion of the trustees. The fifth section enacts that certain
OSLER special provisions shall be added to those in the deed, to
J.A. which effect shall be given whenever they clash with those
in the deed. Those important to be noted are: Sub-section
1—The trustees shall have power to carry on or continue
so much of the operations of the bank as may be necessary
for the beneficial winding up of the same. Sub-section 3
—To do or execute in the name of the bank, or otherwise,
all such other things as may be necessary for the winding-
up of the affairs of the bank and distributing its assets.
Sub-section 5—From time to time, with the sanction of the
Governor-in-Council, to declare and pay dividends to credi-
tors rateably and in proportion to their respective claims.
Sub-section 6—After payment in full of creditors, to pay,
divide, and apportion the remainder of the assets among
shareholders, in proportion to their holdings. Sub-section 11
provides for calling a meeting of the shareholders for the
purpose of appointing a trustee to represent them. Sub-
section 12—At all meetings of shareholders each holder is
entitled to one vote for every share standing in his name.
Sub-section 16—Nothing in the Act is to affect the liability
of shareholders, or the rights of creditors against share-
holders, or the privilege of the Crown, or its rights or
remedies against the bank or the shareholders.

Little appears to have been done in winding up the bank
under this Act; and the Act of 1870, 33 Vic. ch. 40,
already referred to, was passed. The preamble recited that
the property and assets vested by the former Act in the
trustees were wholly insufficient to meet the liabilities of
the bank; that but little progress had been made in the
settlement of its affairs, and that it was expedient in the
interest of the Dominion, the largest creditor, and of all
parties concerned, that provision should be made for a
more speedy disposal of its property and assets and for
making a fair and equitable adjustment and settlement of
the claims of all the creditors.

Section 1 enacts that all the assets, etc., of the bank
held by the trustee corporation under the former Act shall

be and are thereby vested in Her Majesty for the Dominion of Canada and the purposes of the Act upon and after the 1st of August, 1870, subject to the charges, incumbrances, and equities to which they are then subject.

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Section 2.—All the powers, authorities, rights and immunities vested in or conferred on the trustee corporation by the former Act and schedule are transferred to, conferred upon, and vested in the Governor in Council and may be exercised by or through such officer as may be from time to time appointed and Her Majesty's name is to be substituted for that of the trustees in all pending proceedings. Section 4 of the former Act, as to the appointment of trustees, and all the sub-sections of section 5 except 1, 2, 3, 15 and 16 are repealed.

Section 4.—The Governor in Council has full power to dispose of and sell the properties and estates vested in Her Majesty, and the Dominion and all other creditors of the bank shall be entitled to share equally *pro ratâ* and in proportion to their respective claims in the estates and properties of the bank transferred to Her Majesty, and nothing in the Act is to derogate from or impair any authority or power vested in the trustee corporation and thereby transferred to and vested in the Governor in Council.

Section 6 provides that any surplus of the assets is to be divided *pro ratâ* among the shareholders.

The defendants contend that the Act of 1870 is *ultra vires*, as an infringement upon that branch of the powers of the Provincial Legislature which relates to property and civil rights: British North America Act, sec. 92, (13) ; while the plaintiff upholds its validity under section 91, either as an Act coming within class 15, relating to banking and the incorporation of banks ; or class 21, relating to bankruptcy and insolvency.

The Court below not expressing any opinion as to its being within the former class, have treated it as being clearly within the latter, and I entirely concur in that opinion.

Judgment.

OSLER
J.A.

The defendants confined their attack to the second Act only, that being the Act which professes to vest the property of the bank in Her Majesty, but in considering its objects and provisions, we have to look at the Act of 1867, as the powers to be exercised under the Act of 1870, are in the main, having regard to its object, those which were conferred upon the trustee corporation by the former; and it is to be observed that the substantial ground of objection to the latter Act, viz., that property is thereby taken out of the hands of one holder, and transferred to another, is equally applicable to the earlier, which transferred the estate of the bank from the assignee under the assignment of November, 1866, to, and vested it in, the trustee corporation created by the Act.

The 91st section of the British North America Act enacts that the authority of Parliament shall extend to all matters coming within the classes of subjects enumerated in that section, and if we apply to the Act in question, the comprehensive test which has been laid down for ascertaining within which section—91 or 92—it is to be taken to fall, and ask what is the true nature and character of the legislation thereby enacted, the answer appears to me to lie upon the surface. The Act deals with an insolvent bank, and the rights and liabilities of its shareholders; it provides for carrying on its operations for a limited purpose in the name of the bank or otherwise, and the object of the whole is the beneficial winding of it up as an insolvent institution. In one aspect it may be said to rest upon the power to legislate respecting banking and the incorporation of banks; in another, upon that respecting bankruptcy and insolvency, although, having regard to what is undoubtedly the object of the Act, it may be treated as coming wholly within the latter subject. Special provisions of a nature analogous to those found in the Acts of 1867 and 1870 might, I think, have been incorporated with each bank charter without exceeding the legislative power of Parliament; this is contemplated by section 70 of the Bank Act of 1871, 34 Vic. ch. 5.

I fail to see that the mere assignment to trustees for the benefit of creditors deprives Parliament of the right to legislate in respect of the bank as an insolvent institution, or in respect of the trustee corporation by whose hand, as it were, under the authority of Parliament, the winding-up had commenced. It has been argued that all legislation of this nature must be strictly of a general character like the Winding-up Act, which was subsequently passed; and that a special Act dealing with a particular institution is necessarily invalid.

Judgment.

OSLER
J.A.

In support of this proposition, the case of *L'Union St. Jacques v. Bélisle*, L. R. 6 P. C. 31, was cited, but is very far from bearing it out. The point decided in that case is, that an Act of the Quebec Legislature for the relief of a local benefit society, then in a state of financial embarrassment, was *intra vires*. How far the Judicial Committee was from deciding that such an Act as we are now dealing with, would be within the competence of the Provincial Legislature, may be seen from the concluding passage of the judgment: "The fact that this particular society appears upon the face of the Provincial Act to have been in a state of embarrassment, and in such a financial condition that unless relieved by legislation, it might have been likely to come to ruin, does not prove that it was in any legal sense within the category of insolvency. And in point of fact the whole tendency of the Act is to keep it out of that category, and not to bring it into it. The Act does not terminate the company; it does not propose a final distribution of the assets upon the footing of insolvency or bankruptcy—it does not wind it up. On the contrary, it contemplates its going on, and probably at some future time recovering its prosperity."

If, as I think, it would not have been within the power of a Provincial Legislature to pass the Act of 1870, for the reason that it is in all essentials the very opposite of the Act described in the passage I have quoted, it is necessarily an Act dealing with a matter coming within one or other of the classes of subjects assigned to Parlia-

Judgment.

OSLER
J.A.

ment, and as such is valid legislation. Some stress was laid upon minor provisions of the Acts with regard to the execution and registration of instruments as trenching upon the limits of local powers; these, however, are all incidental to the principal purpose of the Act, and at all events nothing has been shewn to turn upon them.

The other point which the defendants make on this part of the case, namely, that the lands were subject to taxation, is, I think, reasonably clear. The legal estate was in the Crown under Anderson's mortgage, and it is for the defendants to point out some provision in the Assessment Act which binds the Crown and which renders lands held by the Crown whether as trustee for the public in the sense in which public lands are so held, or as trustee in the more usual sense of the word, liable to assessment.

In the ordinary case of Crown lands which have been sold or agreed to be sold, or located as free grant, but not patented, the interest of the purchaser or locatee is expressly made taxable, and is liable to be sold; but this is subject to the rights of the Crown, which remain unaffected: R. S. O. (1887) ch. 193, secs. 159, 171; *Moffatt v. Scratch*, 12 A. R. 157.

The defendants, however, contend that, inasmuch as section 7, sub-section 1, expressly exempts property held by Her Majesty in trust for or for the use of any body of Indians, property held in trust for any one else, is, by implication taxable, in accordance with the maxim, *expressio unius exclusio est alterius*. But this maxim is not of universal application: *Saunders v. Evans*, 8 H. L. C. 721, 729, and fails here, because the expression: "Lands vested in Her Majesty in trust for Indians," does not denote a real trust, but merely a restriction which the Crown has imposed upon itself in dealing with lands to which the Indian title, as it is called, has not been extinguished. It does not accurately describe the title under which such lands are held by the Crown, but merely distinguishes them from other Crown lands to which the Indian title has been extinguished. See *Church v. Fenton*, 28 C. P. 384,

388. If, therefore, the express exemption clause, section 7, sub-section 1, is to be taken by implication as a declaration that the Act binds the Crown except in so far as the exemptions of Crown property are defined and limited thereby, the lands now in question, being in fact vested in Her Majesty, were and are by force of that section exempt from taxation so far as the Crown's interest is concerned, and the judgment appealed from, avoiding the sale for taxes so far as it affected that interest, is right and must be affirmed.

Judgment.

OSLER

J.A.

I refer to *Regina v. Williams*, 39 U. C. R. 397; *Attorney-General v. Midland R. W. Co.*, 3 O. R. 511, 521; *Mayor of Essenden v. Blackwood*, 2 App. Cas. 574.

MACLENNAN, J. A.:—

I have been unable to come to the conclusion that the land in question was legally vested in the Crown by the Acts of 1867 and 1870, relating to the Bank of Upper Canada.

The Acts incorporating this bank were consolidated in 1856 by 19 & 20 Vic. ch. 121. By section 6, the chief place of business was fixed at Toronto, but it was authorized to open branches or agencies in other places in the Province, that is, the old Province of Canada, comprising the present Provinces of Ontario and Quebec.

By section 33, a suspension of specie payments for sixty days was to operate as a forfeiture of its charter, and by section 45, the Act and any other unrepealed Acts relating to the bank, were to remain in force until the first day of January, 1870, and from thence until the end of the then next session of the Parliament of the Province and no longer.

By section 137 of the British North America Act, the Parliament of Canada was substituted for the Parliament of the Province, for the purpose of the foregoing section 45.

The bank suspended specie payment on the 18th of September, 1866, and never resumed, but within sixty

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MACLENNAN
J.A.

days afterwards, namely, on the 12th of November, it made an assignment of all its property to five trustees, upon trust for sale and realization, and the payment of its debts, without priority or preference, and in case of a surplus, to pay the same to the shareholders. The assignment contained a provision for change of trustees, and for the execution of such instruments as might be necessary to vest the property in the new trustees from time to time.

On the 21st of December, 1867, Parliament passed an Act, 31 Vic. ch. 17, reciting the assignment, and that the trustees had applied for an Act confirming it, and incorporating them by the name of "The Trustees of the Bank of Upper Canada." The Act confirmed the assignment, incorporated the trustees by the proposed name, and authorized the corporation under that name to hold all the property of the bank and to exercise all the powers given by the deed to the trustees, and also the additional powers conferred by the Act.

Among the additional powers conferred were : (1) To carry on or continue so much of the operations of the bank as might be necessary for the beneficial winding-up thereof ; (2) To execute on behalf of the bank, and in their name as trustees, all instruments they might think necessary, and (3) To do in the name of the bank or otherwise, all things necessary for winding-up the bank and distributing the assets. The Act also contains provisions for the perpetuation of the trustee corporation by the election of trustees to fill vacancies by the shareholders of the bank.

On the same day a general banking Act, 31 Vic. c. 11, was passed, which extended the corporate powers of existing banks over the whole Dominion, but otherwise containing nothing material to the present question. On the 12th of May, 1870, being in the first session of the Parliament of Canada next after the 1st of January, 1870, were passed two Acts : one, a general Act, 33 Vic. c. 11, relating to banking, but which contains nothing material to be

considered here; and the other, 33 Vic. c. 40, an Act specially relating to the affairs of the Bank of Upper Canada. Judgment.
MACLENNAN
J.A.

This Act recites the Act of 1867 above referred to: that the assets were wholly insufficient to meet the liabilities; that little progress had been made in the settlement of the affairs of the bank; that the Dominion was the largest creditor, but had received no dividend, and that it was expedient to provide for the more speedy and equitable settlement of its affairs, and it transferred to Her Majesty, on behalf of the Dominion, all the property held and possessed by the trustees, upon and after the first of August, 1870, and declared that no registration of such transfer in any registry office, nor any assignment, endorsement, or transfer from the trustees, should be necessary to give effect to it, or for any purpose relating thereto. The Act also transferred to the Governor in Council all the powers which the Act of 1867 had conferred upon the trustees, so far as applicable.

In the year 1871, on the 14th of April, a new banking Act, 34 Vic. ch. 5, was passed, which continued the charters of a number of named banks for a further period of ten years, but no mention is made therein of the Bank of Upper Canada, and so far as I have been able to discover none of its provisions are in any way applicable to that bank.

On the same day, however, an Act (34 Vic. ch. 8) was passed to amend the Act of 1870, 33 Vic. ch. 40, by authorizing the Governor in Council to pay off claims against the bank of Upper Canada to an amount not exceeding \$250,000.

The foregoing is all the legislation, so far as I can perceive, having any bearing on the present case with the exception of section 55 of the Registry Act of the Province of Ontario, 31 Vic. ch. 20, which makes special provision for the registration, in the registry offices of Ontario, of the assignment of the 12th of November, 1866, as confirmed by Act of Parliament, 31 Vic. ch. 17.

Judgment.
MACLENNAN
J.A.

The land in question in this case was the property of the Bank of Upper Canada, when the assignment was made, and the question is, whether by virtue of that assignment, and of the Acts above referred to, the title passed to Her Majesty.

It is quite clear, I think, that the title passed to the five trustees named in the assignment, for whatever question there might have been concerning the validity of the assignment as a method of settling the bank's affairs, there could be none as to its power to execute a conveyance of land so as to transfer the legal title thereof to the grantee.

The effect of the assignment, executed as it appears to to have been by all parties, including some of the creditors was to vest the land in question in the persons named, upon certain trusts for sale, and for the application of the proceeds, and I cannot see that the trust thus created was different from any similar trust created by a trading company, or by a partnership firm, or by a private person. There were five trustees, and they had property to administer. The trustees were not the bank. The bank was a thing apart from the trustees. The bank no longer had any property. The trustees had the property, and the bank had no longer any interest in it, not even in the proceeds. The proceeds belonged to the creditors, and if there should be any surplus, it was to go to the shareholders; but neither were the shareholders the bank. There was not even a resulting trust in favour of the bank, for no matter how large the surplus might turn out to be, it was all to go to the shareholders. Then, the sixty days having elapsed without resumption of specie payments, the charter became forfeited, and I take the effect of that to be, that the powers of the bank as a corporation for the purpose of carrying on the business for which it was originally created, were lost and gone; although the corporation did not become wholly extinct, so as to prejudice creditors in their remedies against shareholders, or to prevent actions being brought in its name to recover choses in action which had been assigned to the trustees, as was held in

Brooke v. Bank of Upper Canada, 4 P. R. 162, and 17 Gr. 301. But whatever remained of the bank as a corporation, in my judgment it was a thing apart and distinct from the trustees and from the trust which had been created by the assignment. That was the state of affairs on the 21st of December, 1867, when the Act of that date was passed by Parliament. If the assets of the trust had all been within the Province of Ontario, I think the trust would have been a matter of a merely local nature in the Province, and that Parliament could have had no power whatever to deal with it: British North America Act, sec. 92 (16). There is no evidence before us, or in the assignment, or in the statutes, that any of the assigned property was without the Province of Ontario, but I assume in favour of the legislation that such was the fact. If so, it may be that Parliament had power to create the trustees a corporation for the purpose of administering a trust which was to be performed partly in one Province and partly in another.

Upon that, I express no opinion, but whether it had or had not power to give corporate capacity to the trustees, it by no means follows that it had power to dispense with conveyance and to vest the land in question by an act of legislation in the corporation so created. The incorporation of the trustees seems to be a fact immaterial to this question. It seems also to be immaterial that the corporators were the existing trustees. The question of the validity of the Act would be the same if, instead of incorporating the existing trustees, the Act had appointed five or any other number of new persons to be trustees in place of the others. In my judgment, it is clear that Parliament could not change the trustees under an assignment for creditors made by a private person, or by a trading corporation, and vest the property in the new trustees so appointed, without conveyance; nor do I think that the mere power to create a corporation for the purpose of such a trust, would include the power to dispense with or change the mode of conveyance sanctioned by the law of the

Judgment.
MACLENNAN
.A.

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MACLENNAN
J.A.

Province. That would be to interfere with the law of property and civil rights in the Province, and would, I think, be clearly beyond the power of Parliament.

In *Citizens Ins. Co. v. Parsons*, 7 App. Cas. 117, the following passage occurs in the judgment of the Judicial Committee of the Privy Council: "It by no means follows that because the Dominion Parliament has alone the right to create a corporation to carry on business throughout the Dominion, that it alone has the right to regulate its contracts in each of the Provinces. Suppose the Dominion Parliament were to incorporate a company, with power, among other things, to purchase and hold lands throughout Canada in mortmain, it could scarcely be contended if such a corporation were to carry on business in a Province where a law against holding land in mortmain prevailed, (each Province having exclusive legislative power over property and civil rights in the Province), that it could hold land in that Province in contravention of the Provincial legislation; and if a company were incorporated for the sole purpose of purchasing and holding land in the Dominion, it might happen that it could do no business in any part of it, by reason of all the Provinces having passed Mortmain Acts, though the corporation would still exist and preserve its status as a corporate body." And so I think that even if Parliament could create a trust corporation to carry out the assignment of the Bank of Upper Canada, the trust being nothing but a matter of property and civil rights,—a trust for the sale of property, and the distribution of the proceeds,—Parliament could not transfer the property by methods not authorized by the law of the Province; and the attempted transfer was, therefore, in my opinion, ineffectual.

I think the same reasons apply to the Act of 1870, which assumed to transfer the trust estate to Her Majesty without surrender by deed, and to dispense with the mode of transfer recognized by the law of the Province.

It was contended, however, that because the property which was the subject of the trust had been the property of a bank,

that circumstance gave Parliament authority to enact the legislation, by virtue of section 91 (15) of the British North America Act. Judgment.
MACLENNAN
J.A.

That section gives jurisdiction over banking and the incorporation of banks, but I am unable to see how it could in any way authorise the Acts in question. Parliament can make laws on the subject of banking, has exclusive power to regulate that kind of business, and it can also incorporate banks. But the Acts in question are not Acts on the subject of banking, or Acts regulating that kind of business, nor are they Acts incorporating a bank. When the Act of 1867 was passed, the bank's charter had been forfeited, and the forfeiture was never removed. By the bank's charter, 19 & 20 Vic. c. 121, sec. 45, as mentioned above, all the Acts under which it derived its corporate powers were to expire at the end of the session of Parliament of 1870. That session came to an end, and the charter was never renewed, and the corporate powers of the bank ceased to exist. Neither of the Acts professes to revive, or renew, or extend the powers which had then become extinct, both by forfeiture and effluxion of time: *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221, and *Lindsay Petroleum Co. v. Pardee*, 22 Gr. 18. In my opinion, the effect of the assignment, which was never attacked or questioned in any way, and which the Acts referred to indeed assume to confirm, was that the assigned property ceased to be the property of the bank, and became the private property of the creditors, and of the shareholders in their private capacity. The bank could not recover it back, and as I have pointed out, there was not even a resulting trust in its favour. Under these circumstances, I am, with great deference, unable to see how it is possible to contend that Parliament could legislate upon this property by virtue of its legislative authority over banking and the incorporation of banks.

It is also contended that the Acts may be maintained under sub-section 21, as bankruptcy and insolvency legislation, and this is the ground upon which the judgment

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MACLENNAN
J.A.

in review is rested. I am unable, with great respect, to agree to this view. It is well settled, and I think no one ever doubted, that, as incidental to a general bankrupt or insolvent Act, Parliament could modify the law of property in any Province so far as might be necessary, and could declare that the property of a bankrupt or insolvent should pass to an assignee without conveyance. But I cannot regard the Acts in question as, in any proper sense, bankruptcy or insolvency Acts. There was, at the time the Acts passed, a general law of insolvency on the statute book, but it was not applicable to banks, and the Acts do not profess to extend the provisions of the Insolvent Act to the case. Neither is there anything in the Acts themselves impressing them with that character. They do nothing more, as I have pointed out, than change the trustees; in the first instance, by creating a corporation and transferring the trust property to it, and afterwards by substituting the Governor in Council, in the name of Her Majesty, for the trustee corporation, and assuming to transfer the property to Her Majesty.

I humbly think that the power of legislation over bankruptcy and insolvency, which was intended to be conferred on the Dominion Parliament, was the same as had been exercised by the Imperial Parliament and by the Provincial Legislatures before Confederation, namely, the passing of laws more or less general in their application, with proper Courts and procedure, and machinery for carrying them into effect, and not Acts declaring a particular person or firm or corporation bankrupt or insolvent or putting their affairs into a course of liquidation. In England, for a long time before 1861, bankruptcy was confined to traders; but it applied to all traders, and by 1 & 2 Vic. ch. 110, an Insolvent Act was passed for the relief of non-traders, and that also was a general Act, and the Winding-up Act is also general in its application to companies, and the same is true of the legislation in the old Province of Canada. I think the power to pass the kind of legislation effected by the Acts in question, not

general but dealing with particular cases, was not intended to be conferred upon the Dominion Parliament, but was intended to be given to the Legislatures of the Provinces, as matters of property and civil rights, and matters of a merely local and private nature: section 92 (13) and (16). The result is, in my humble opinion, that the title to the property in question never passed out of the trustees in whom it was vested at the time of the passing of the Act of 1867, and that it was therefore assessable, and that the sale for taxes and the subsequent conveyance by the county treasurer passed the title to the defendant Cutten: *Cushing v. Dupuy*, 1 Cart. at p. 258, 5 App. Cas. at pp. 415, 416; *Citizens Ins. Co. v. Parsons*, 1 Cart. at pp. 277, 279, 7 App. Cas. at pp. 111, 112, 113; *L'Union St. Jacques v. Bélisle*, 1 Cart. at pp. 69, 70, 71, L. R. 6 P. C. at pp. 36, 37; *Bank of Toronto v. Lambe*, 12 App. Cas. at p. 586; *Valin v. Langlois*, 3 S. C. R. 1.

Judgment.
MACLENNAN
J.A.

I am, however, of opinion that the Crown is entitled to recover lot No. 16 and also the proceeds of the sale to McFadden of the north half of lot 17, less whatever just claim the defendant Quirt may have, as mortgagee, for money advanced by him upon receiving the conveyance from Cutten.

In my judgment the evidence shews that the defendant Anderson committed a fraud upon the Crown with the object of obtaining the property in question for his wife. He obtained his title from the Crown and gave the Crown a mortgage, whereby he bound himself to pay the taxes, and he appears to have paid them for several years. He then allowed them to go into arrear. So that in due time the land was advertised and sold for the arrears to the defendant Cutten for \$145. Cutten's evidence is that "a short time after the sale," "a few days or weeks," Anderson came to him and said he would like to get the lots in question and others which Cutten had bought at the tax sale, that is Cutten's right to them, and Cutten agreed to let him have them for a profit of \$200 over and above the taxes. Anderson is a registrar of deeds for the County of

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MACLENNAN
J.A.

Wellington, and it is not too much to suppose that he knew that he was entitled to redeem the lots in question, at any time within a year after the tax sale, by paying an advance of ten per cent. over what had been paid by Cutten, which would be a sum of \$14.50. That is what his covenant contained in the mortgage which he had made to the Crown required him to do, and what any honest man would have done, if he had the money with which to pay. Or if he had not the money he should have advised the solicitor for the Crown of the sale which had taken place, so that the Crown might have redeemed the land. Instead of doing that, however, he agreed with Cutten for the purchase of his certificates in this and another property for a bonus of \$200, and he let the matter stand until the year for redemption had elapsed, and then arranged with Quirt to lend him the money he had agreed to pay Cutten and to take a conveyance from Cutten as his security. That this was all arranged and carried out by Anderson is clear, for Cutten says so, and that he did not know Quirt, and never saw him until afterwards. The deed to Quirt was in consideration of \$450, and it comprises besides the lots in question, lot 12 in the 17th concession of Maryboro'. Quirt admits that the conveyance to him was merely as security, and the result was that upon that conveyance being made, and the money agreed to be paid to Cutten having been paid, the lands so conveyed became once more the lands of Anderson, subject to the mortgage to Quirt, and subject to that mortgage, the right of the Crown against the land was re-established. Four days after the conveyance to Quirt, the latter, at Anderson's request, signed a declaration of trust in favour of Anderson's wife, declaring that he held the three parcels conveyed to him by Cutten as trustee for her, subject to the payment of the \$450 and interest.

It is plain, however, that Mrs. Anderson is a volunteer, and that her equitable title is inferior to the equitable title of the Crown, which was prior in time and was also for valuable consideration.

The Crown is therefore to be preferred to Mrs. Anderson as regards the lands in question, and is also entitled to cast upon the Maryboro' lands the payment of the \$450 and interest, which the mortgagor, the defendant Anderson, ought to have paid in fulfilment of his covenant.

The judgment must therefore give the Crown a charge upon the Maryboro' lands to the extent of its loss by the sale for taxes and the subsequent proceedings, including the sale made by Quirt to McFadden of the north half of 17.

Appeal dismissed with costs,
BURTON, J. A., *dissenting.*

Judgment.
MACLENNAN
J.A.

HENDERSON V. KILLEY ET AL.

Partnership—Dissolution—New firm—Novation—Trust—Right of third person to enforce.

A firm composed of two members dissolved partnership. One of the partners continued the business, giving to the retiring partner a number of notes in payment of his share in the business. The continuing partner afterwards formed a partnership with another person and, by the articles thereof, transferred to the new firm, as his contribution to the capital, all the assets of his business subject to the deduction therefrom of his liabilities, which they were sufficient to pay in full, and which were to be assumed by the co-partnership and charged against him. Among these liabilities, known to the new partner, were a number of the notes which the retiring partner had endorsed to the plaintiff before maturity. The new firm paid two of these notes and interest on another, and had some negotiations with the plaintiff for an extension of time for payment of the unpaid notes:—

Per HAGARTY, C.J.O., OSLER, and MACLENNAN, JJ.A., differing on this point from the judgment of the Queen's Bench Division, 14 O. R. 137, that no trust was established in favour of the retiring partner by the articles of partnership of the new firm, and that the plaintiff was not entitled to enforce against the new firm the performance of the stipulation in the articles for payment of the notes held by her:—

Per BURTON, J.A. There was a trust and the judgment should be affirmed on that ground:—

Per HAGARTY, C. J. O. The judgment should be affirmed on the ground that the evidence established an independent agreement between the new firm and the plaintiff to pay the notes in question:—

Per BURTON, OSLER, and MACLENNAN, JJ.A. No such agreement was proved.

Gregory v. Williams, 3 Mer. 582, and *In re Empress Engineering Co.*, 16 Ch. D. 125, specially considered.

The Court being thus evenly divided as to the result, the appeal was dismissed, with costs.

Statement.

THIS was an appeal by the defendants, the Osbornes, from the judgment of the Queen's Bench Division, reported 14 O. R. 137, and came on to be heard before this Court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.), on the 26th of November, 1888.

Robinson, Q. C., and *Mackelcan*, Q. C., for the appellants.
Osler, Q. C., and *Tetzels*, for the respondent.

January 8th, 1889. HAGARTY, C.J.O.:—

We have to consider the case under two aspects: 1st. As to the rights, if any, acquired by the plaintiff under the articles of partnership between the defendants; and 2nd.

As to whether the firm has made itself liable to her, on any new or subsequent consideration, by their dealings with her.

As to the first:—She was a stranger to the partnership agreement,—neither a party nor shewn to have been in any way communicated with or asked to assent or to have had any knowledge of it until some time after its execution.

She was the holder in good faith of promissory notes of the defendant Killey to a large amount payable at different dates, and she had no other security than these notes.

Killey then enters into partnership with the defendants the Osbornes by the articles of the 29th of February, 1884.

Killey brings in as his contribution to capital all his business assets and property, and the Osbornes bring in their foundry plant and property—Killey's property to be taken at the valuation recently made and entered in the stock book, "subject to the deduction of all liabilities of Killey & Co., which are to be assumed by the said co-partnership and charged against Killey."

The parties to be interested in the business in proportion to the amounts contributed by them to the capital.

It was proved that a schedule of Killey's debts was made out, and amongst them was the item \$5,000, representing these notes. Two of these notes appear to have been paid by the new firm after date of this agreement, and also after some time some interest was paid on another note.

We have now to consider whether the plaintiff acquired any interest under this contract of partnership made without reference to her, or knowledge on her part, and to which her assent was not asked or required.

If she in law acquired an interest in it I presume it could not be altered or rescinded without her assent. But it appears to be altogether a matter wholly between the actual contracting parties, and in my opinion could have been altered or wholly released by them the day after its execution. No right in any other person was in my judgment created by the arrangement that the new firm would assume certain of Killey's debts, including that of the plaintiff, and they could at any time have varied or released each other therefrom.

Judgment.

HAGARTY
C.J.O.

Judgment.

HAGARTY
C.J.O.

It has been held in the Queen's Bench that by this deed Killey became a trustee for the plaintiff, and "that this is an instance in which the plaintiff is entitled to treat Killey, who exacted the stipulation in this deed, as her trustee, and through him to enforce it."

I feel great difficulty in acceding to this view of the law.

Killey owes certain debts, he carries on business as an iron founder. He forms a partnership with the Osbornes, who are in a like business. He brings in his stock, &c., valued at an agreed price. He states the amount of certain debts owing or accruing due by him; it is agreed that the firm thus formed shall assume these debts of his, and as they pay, the amounts are to be deducted from the valuation of his stock, &c., to that extent reducing his interest in the firm capital. His debts are thus to be paid out of the joint earnings of the three. He is in no way relieved from his liability to his creditors, but the firm are to share with him in the payment, as he no longer out of his sole business earnings has the power to provide therefor. He has a right to enforce these provisions, and to require the funds of the firm to be so applied. But the Osbornes would have the right, on the discovery of any fraud or deception practised on them in the valuation of the property brought in by Killey, which seems to have been the basis of the partnership, to claim the aid of equity for their relief either by a rescission or dissolution of a contract into which they had been misled, and the result might be fatal to any benefit the creditors of Killey might hope to receive from the formation of the new firm. But all this would be fatal to the position taken by the plaintiff.

One of the latest definitions may be found in *Gandy v. Gandy*, 30 Ch. D. 57. Cotton, L.J., says, after noticing the general rule: "That rule, however, is subject to this exception: if the contract, although in form it is with A. is intended to secure a benefit to B., so that B. is entitled to say he has a beneficial right as *cestui que trust* under that contract, then B. would, in a Court of Equity, be allowed to insist upon and enforce the contract." That was

the case of a deed by which a husband covenanted with trustees, *inter alia*, to pay to them all the expenses of the maintenance and education of the two youngest daughters, and the suit was by one of the daughters against the husband and trustees to enforce the husband's covenant. The trustees had refused to join as plaintiffs.

Judgment
HAGARTY
C.J.O.

It was held that the plaintiff was not in the position of *cestui que trust* to maintain the action.

The preceding case of *Touche v. Metropolitan Railway Warehousing Co.*, L. R. 6 Ch. 671, is discussed and explained, where Lord Hatherley held, in very wide terms, "the case comes within the authority that when a sum is payable by A. B. for the benefit of C. D., C. D. can claim under the contract as if it had been made with himself."

But there the claim was founded on the articles of association which recited services performed by certain persons in the formation of the company, the plaintiff being one, and it was provided that as soon as a certain amount of stock was taken that a sum of £2,000 should be paid to one Walker as promoter and director for the purposes of the arrangement recited in the deed. In that recital it was stated that Walker had arranged that he should pay such persons as soon as the company was in a position to commence business and the Lord Chancellor found as a fact that Walker was trustee for the plaintiff.

Then we have to consider *In re Empress Engineering Co.*, 16 Ch. D. 125, before the Court of Appeal. The Master of the Rolls, says: "A mere agreement between A. and B. that B. shall pay C., (an agreement to which C. is not a party either directly or indirectly), will not prevent A. and B. from coming to a new agreement the next day releasing the old one. If C. were a *cestui que trust*, it would have that effect." He then discusses *Gregory v. Williams*, 3 Mer. 582, and explains its effect. He had previously discussed Lord Hatherley's decision. He proceeds: "As Lord Justice James suggested to me in the course of the argument, a married woman may nominate somebody to contract on her behalf, but then the person makes

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the contract really as trustee for somebody else, *and it is because he contracts in that character that the cestui que trust can take the benefit of the contract.*"

James, L. J., says as to *Gregory v. Williams*: "It appears quite clear that there was there a transfer of property with a declaration of trust in favour of a third person, which was a totally different thing from a mere covenant to pay money to that person. * * I may add, as the Master of the Rolls pointed out to me in the course of the argument, that in *Gregory v. Williams*, the man with whom the contract was made was one of the plaintiffs, and the only defence there would have been misjoinder of plaintiffs, and that is a defence which the Court was not likely to view with much favour."

In *In re Flavell*, 25 Ch. D. 89, the cases are fully reviewed, especially the *Empress Engineering Company Case*, and *Gregory v. Williams*, by North, J. His decision was affirmed in appeal. The general principle is fully discussed.

In *In re Rotherham Alum Co.*, 25 Ch. D. at p. 111, Lindley, L.J., says: "An agreement between A. and B., that B. shall pay C., gives C. no right of action against B. I cannot see that there is in such a case any difference between equity and common law. It is a mere question of contract."

The subject is discussed in the notes to the leading case of *Ellison v. Ellison*, 1 W. & T. L. C., 6th ed., 291, and several of the cases to which I have referred are commented on.

In Pollock on Contracts, 4th ed., p. 202, *Gregory v. Williams*, is cited as establishing that a third person, for whose benefit a contract was made, may join as co-plaintiff with one of the actual contracting parties against the other and insist on the arrangement being completely carried out. * * * "It was not at all suggested that he (Gregory) could have sued alone in equity any more than at law, and the true view of the case appears to be that the transaction between Williams and Parker amounted to a declaration of trust of the property assigned for the satisfaction of Gregory's claim to the specified extent," citing *In re Empress Engineering Co.*, 16 Ch. D. 125.

I may refer to the very well considered and instructive judgment of Strong, V. C., in *Mulholland v. Merriam*, 19 Gr. 288, and its result is fully justified and supported by the cases that have subsequently arisen in England.

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There is no doubt that in such a case as the last, the plaintiff was, by the instrument in question, put in the position of a *cestui que trust*, and the defendant in that of a trustee.

But I am unable to apply any of the decisions mentioned to the support of the plaintiff's contention here. I think there was no creation of any trust for the plaintiff, and that Killey was not her trustee, nor she a *cestui que trust*.

It remains to consider whether the new firm has made itself liable to the plaintiff by any action since the deed of partnership.

The trial Judge, the late Sir M. C. Cameron, dismissed the action as against the Osbornes, and entered judgment against Killey for the full amount. He found that the Osbornes, on behalf of Osborne, Killey & Co., paid some of the notes, but that they made no direct promise to pay the notes, though until they positively refused to pay, they did not directly repudiate liability thereon, but merely stated they had not moneys at the time to pay with. He held that the Osbornes were not liable, being no parties to the notes sued upon and under no direct liability to the plaintiff, their liability being to defendant Killey, who does not require them to make the payment.

It is not easy to find a case as to partners, resembling the present in its facts. Most of the questions arise on the retirement of a partner and the continuance of the business by the remaining partners, who assume the liabilities of the firm, and, in some cases, agree to indemnify the retiring partner.

In the case before us Killey remains liable, and there is little, if any, resemblance between this and the cases where there may be a novation, which Pollock defines thus: "When a creditor assents at the debtor's request to

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accept another person as his debtor in the place of the first, this is called a novation." (4th ed., p. 193.)

He also puts it thus: "Did the new firm assume the debts and liabilities of the old, and did the creditor, knowing this, consent to accept the liability of the new firm and discharge the original debtor."

In Lindley on Partnership, it is thus stated: (4th ed., p. 208). "If an incoming partner chooses to make himself liable for the debts incurred by the firm prior to his admission therein, there is nothing to prevent his so doing. But it must be borne in mind that even if an incoming partner agrees with his co-partners that the debts of the old shall be taken by the new firm, this, although valid and binding between the partners, is, as regards strangers, *res inter alios acta*, and does not confer upon them any right to fix the old debts on the new partner. In order to render an incoming partner liable to the creditors of the old firm, there must be some agreement, express or tacit, to that effect entered into between him and the creditors, and founded on some sufficient consideration. If there be any such agreement the incoming partner will be bound by it, but his liabilities in respect of the old debts will attach by virtue of the new agreement and not by reason of his having become a partner.

An agreement by an incoming partner to make himself liable to creditors for debts owing to them before he joined the firm, may be, and in practice generally is, established by indirect evidence. The Courts, it has been said, lean in favour of such an agreement, and are ready to infer it from slight circumstances, and they seem formerly to have inferred it whenever the incoming partner agreed with the other partners to treat such debts as those of the new firm. But this certainly is not enough, for the agreement to be proved is an agreement with the creditor, and of such an agreement an arrangement between the partners is of itself no evidence."

I have made this extract as the summary of the law in a work of the highest repute.

The evidence here for the plaintiff is that when she heard of the partnership she went to the office of the firm and they told her they had not money at the time, but would pay if given time—calling several times she got the same answer.

They proposed paying \$100 per month or \$500 every three months, and the rate of interest was spoken of but nothing was agreed to. They paid her some interest on one of the notes, and it appears that they paid off two of them, to the plaintiff's brother—Muirhead, the original payee—to whom the plaintiff gave them back, and that the defendant firm endorsed them for discount, and the plaintiff also speaks of endorsing one of them to get a renewal.

The plaintiff had no idea in any of her dealings with the defendants except to get her money from somebody, and no question or suggestion arose as to any discharge of Killey or of substituting the engagement or liability of the three for the separate liability of Killey. She was not a customer of the old business of Killey, or of the new firm—all her claim was as holder of his notes. So nothing can be gathered from any course of dealing with either the new or the old business.

But do the facts shew that the plaintiff accepted the new firm as her debtors, abandoning any claim against the old firm or business? The cases shew that this may be done, but the difficulty arises here from the plaintiff's own conduct.

Lord Eldon's judgment in *Ex parte Williams*, Buck, 13, seems clear against the right of a creditor of A. to found a claim against A. and his new partner B. on the ground that the new firm have taken the assets and assumed A.'s liabilities. He says if it be meant that an action might be maintained against the new partners "immediately upon the execution of the deed, and by force of that deed only, independent of any accession to the agreement on the part of the creditors named in the schedule—I cannot assent to that doctrine." To the same effect he speaks in *Ex parte Peele*, 6 Ves. 602. In *Ex parte Freeman*, Buck, 471, the same view

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is taken. The language is very clear. I think this view of the law has never been altered, and that no action could be brought by a creditor on the partnership deed.

There are American cases pointing the other way, such as *White v. Thielens*, 106 Pa. St. 173; *Arnold v. Nicholls*, 64 N. Y. 117, a case not unlike the present. But the general law is stated in *Parsons on Partnership*, 2nd ed., p. 434, against any such right, quoting the cases in *Buck*, &c., &c.

Most of the cases arose in claims to prove debts on either joint or separate commissions.

One of the principal modern cases is *Rolfe v. Flower*, L. R. 1 P. C. 27. A firm of Rutledge & Co., dealing largely with a firm of Flower & Co., took two clerks into partnership, there being no agreement in the articles as to assuming the existing liabilities. The dealings with Flower & Co. continued for three years, then the firm became bankrupt. Flower & Co., proved against the joint estate. It was sought to expunge their proof, but it was held, affirming the Australian decree, that there was sufficient proof in the dealings and transactions of the several parties to shew that the new firm on its formation adopted the liabilities of the old firm, and that Flower & Co., had consented to adopt the new firm as their debtors and to discharge the old firm, their original debtors.

That conclusion was arrived at from the various facts in evidence, and not from express stipulation.

The case is very full in its notice of the authorities in the argument and judgment.

In delivering the judgment, Lord Chelmsford says: "The question is not to be decided upon probabilities, but upon evidence, although much evidence is not required to establish the assumption by the new firm of the debts of the old. Lord Thurlow in *Ex parte Jackson*, 1 Ves. Jr. 132, said: 'If one man having debts, takes another into partnership with him, a very little matter respecting those debts will make them both liable.' And Lord Eldon, in *Ex parte Peel*, 6 Ves. 604, thought that 'slight circumstances,'

might be sufficient to prove an agreement to undertake such a liability." Again, he says, after holding that the new firm had assumed the liabilities: "The only remaining question to be considered is, whether Flower & Co., being aware of this arrangement, consented to accept the liability of the new firm, and to discharge their original debtors. Upon this question, as upon that of the agreement of the parties *inter se*, it was said by Lord Eldon, in *Ex parte Williams*, Buck, 13, 'A very little will do to make out an assent by the creditors to the agreement.'"

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It was held that, if Flower & Co. had sued the old firm, there would have been ample evidence to satisfy a jury that they had discharged the old firm, and had accepted the new one as their debtor.

No direct evidence was given on that head. It is an inference of fact deduced from the facts and dealings.

A difficulty has been suggested as to the evidence, that we could not infer from it that the plaintiff had consented to abandon or release her claim against her original debtor; in other words, though she fully assents to accepting the new firm as her debtors that she does not abandon or discharge the others, and it is pointed out that she retains Killey's notes to Muirhead, her brother, and includes him as indorser in this suit in which he suffers judgment by default.

The case of *Re The Commercial Bank Corporation of India and the East*, 16 W. R. 958, is noticed, and there is no doubt that Sir W. P. Wood, and Selwyn, L.JJ., seem to consider that the evidence must amount to a kind of novation—a discharge of the old debtor and the acceptance of the new in lieu thereof.

That was not a case of a partnership continuing, or of a retiring or incoming partner. The Commercial Bank of India was in liquidation, and a new company obtained a charter to take over all the assets and assume the liabilities of the old. Captain Jones was a depositor of the old company, receiving dividends on his money. He knew nothing of the change, and continued for some time to receive his

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dividend from the new company—the name being slightly changed—and from the office in Bombay as before. The new company also went into liquidation, and he proved his claim. He had never done any other act or had any other knowledge.

Wood, L. J., says: “No doubt very slight knowledge and recognition by Captain Jones of these facts would have been sufficient to bind him.” His proof was expunged, the Court holding that the novation was not complete, his old debtors remaining liable to him.

I can hardly think that the rule would apply with so much rigidity to a case like this where the old debtor continues in the new firm, and is liable in it and with it.

The case before the Lords Justices was of two wholly separate and independent debtors, and even there it was stated that slight evidence would have altered the decision.

The oft cited *Ex parte Jackson*, 1 Ves. Jr. 130, supports my view.

One Weldon, a trader, died owing money to Jackson. His widow continued the business and borrowed more money from Jackson giving her bond for the whole. She afterwards took her son and nephew into partnership and after two years a commission in bankruptcy is issued against her and her nephew. Jackson petitioned to be allowed to prove under the joint commission. It was objected that he was only a separate creditor, having taken her bond.

Lord Thurlow said he would do what he could to allow the proof, and said: “I asked if any interest had been paid upon the bond by both, for, if so, I should have considered it as adopting the debt and making the partnership liable to it. Then I could do it consistently with the principle. If they have in any way considered the debt as a joint debt, I will understand it so, as it ought to be.” He then adds the words already cited in Lord Chelmsford’s judgment.

There is surely sufficient in this case to satisfy Lord Thurlow’s views. We have payment of two of the notes by the new firm, and payment of interest on another note and propositions for time and payments at extended periods,

to say nothing of the original agreement to assume Killey's scheduled debts, of which the plaintiff's was one.

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HAGARTY
C.J.O.

I cannot see that the inclusion of the endorser as a defendant can alter the substantial merits of the claim.

I suppose the plaintiff never gave the matter a thought as to whether she should formally abandon all pretext of a claim against Killey's separate estate —if he had any— nor as to any claim against Muirhead as the endorser. We may safely assume that she knew nothing of the intricacies of the law on this point.

I think the evidence warrants the conclusion, as one of fact, that she has adopted the new firm as her debtors instead of any shadowy claim she might have against Killey's separate estate.

Lord Eldon, in *Ex parte Williams*, Buck, 13, after saying that very little will do to make out an assent to the agreement (*i. e.*, as to the assumption of former debts) says: "If any of the creditors named in the schedule think they can make out such a case, they may apply on that ground to prove their debts against the joint estate."

In *Ex parte Kedie*, 2 Dea. & Ch., 321, the Chief Judge says: "It cannot be doubted, after the case of *Ex parte Jackson*, under a commission of bankrupt the amount of a bond debt due from one partner, which has been adopted by both partners, may be proved against the joint estate."

In *Ex parte Lane*, DeG. 300, the Chief Judge says, "If A. be a creditor of B., and B. and C. propose to enter into, or have entered into, partnership and say to A., 'We wish this debt to be a debt from us both and we will pay it,' and A. accedes to that, although there is no writing, the agreement is valid and effectual, and is not impeached or affected by the Statute of Frauds. The effect of such an agreement is to extinguish the first debt and for a valuable consideration to substitute the second debt. These very words need not be used by the parties if there was sufficient to shew that the intention was so; that will be as effectual as if the most formal expression had been given to the intention."

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HAGARTY
C.J.O.

In *Ex parte Freeman*, Buck. 471, it is said that the agreement of the new firm to assume the debts of the old may be considered only as a proposal to become sole debtors. If the creditor assent to this before the bankruptcy, then a contract to that effect is concluded.

He denies that the proposal *inter se*, without assent or recognition, can be sufficient.

On the whole, I am of opinion that the appeal must be dismissed.

I would not have discussed the first question as to the partnership deed in itself supporting the action, but for a different view as to the effect of *Gregory v. Williams*, 3 Mer. 582, being pressed on us and apparently sanctioned by part of the Court.

I decide in favour of the plaintiff on the second ground.

BURTON, J. A. :—

I am unable to agree in the view that there was any evidence to support a recovery on the ground of a novation, in other words, an agreement on the part of the plaintiff to accept the joint liability of the partners of the new firm and discharge the original debtor.

The course pursued by the plaintiff in this action in treating the note of Killey as still in force and suing the endorser upon it negatives any such agreement, and is I think sufficient to dispose of that branch of the case, nor have I been able to convince myself that the Queen's Bench Division were wrong in holding the new firm liable on the ground that a trust was created at the time of the transfer of the property which this plaintiff is in a position to enforce.

The whole subject was much discussed and considered in the recent case of *Mitchell v. City of London Assurance Co.*, 15 A. R. 262, in this Court, in which I was unable to concur with the other members of the Court, purely and simply on the ground that I could see nothing in the case but an agreement made by one party with a second to pay money to a third.

I thought that was a pure question of contract, and if I could convince myself that this was a case of that nature, I should hold that the plaintiffs could not recover, but there is much to be said in favour of the view taken by the Divisional Court that this comes within the class of cases referred to by Lord Justice James in *In re Empress Engineering Co.*, 16 Ch. D. 125, where he draws the distinction between a mere contract and cases of trust referring to *Gregory v. Williams*, 3 Mer. 582, in these terms: "There was there a transfer of property with a declaration of trust in favour of a third person, which was a totally different thing from a mere covenant to pay money to that person."

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BURTON

J.A.

How does this case differ in principle from *Gregory v. Williams*, 3 Mer. 582? If the transfer had gone on to say, and the company agree with Killey as trustee for and on behalf of the scheduled creditors of Killey to pay their several debts, there could be no question of the right of the plaintiff as one of those creditors to bring a suit. Is not that in substance what this deed says? The language of the deed is:—The property shall be taken subject to the deduction of all liabilities of J. H. Killey & Co., which are to be assumed by the co-partnership and charged against Killey." All these liabilities have been paid by the firm, with this sole exception.

Very little will suffice to create the relationship of trustee and *cestui que trust*. See *Tomlinson v. Gill*, Amb. 330.

I do not for a moment question that Killey had the entire control and right of disposal of this property, and he might have taken the notes of the partnership and disposed of them as he thought proper; he did not do so, but sold it subject to the payment of the scheduled creditors. It is difficult to see why he did not thereby constitute himself a trustee for them of so much of the purchase money as represented their debts; and if he had received payment of this particular debt why the money would not have been impressed with a trust in favour of the plaintiff and not liable to be taken for his general liabilities.

Judgment.

BURTON
J.A.

The case is complicated by reason of Killey being a member of the new partnership; but if he had transferred to a firm of which he was not a partner, and would then have occupied the position of trustee, this fact ought not to deprive the plaintiff of her rights; the complication would perhaps be an additional reason for the plaintiff suing alone.

I am free to admit the case is by no means free from doubt, and if the decision in the Court below had been the other way, I should, in deference to my learned brothers' opinion, not dissent, but as I am not clear that the judgment of the Court below is wrong, I shall adopt the advice of a very eminent Judge, who, in speaking of the duty of an Appellate Court, declared that to doubt is to affirm.

There is every reason in morals why these defendants, who have received the benefit of the property, should carry out their engagement. They have never paid for the stock transferred to them, and I am glad to feel that if the judgment can be sustained, no obstacle will exist in law to compelling what justice and good sense demand.

I think the appeal should be dismissed.

OSLER, J. A.:—

I agree with the learned Chief Justice, for the reasons given by him in the judgment which has just been delivered, that no trust was created in favour of the plaintiff by the partnership deed, and that the case is not brought within the principle of *Gregory v. Williams*, 3 Mer. 582.

The new firm were not contracting in the character of trustees for the creditors of Killey. That was not the object or intention of their agreement. What they had in view was their partnership arrangements, not the benefit of Killey's creditors. The circumstances are very similar to those in the case of *Ex parte Williams*, Buck, 13, and if the claim of the creditor in that case could have been maintained on the footing of a trust having been

created by the partnership agreement, which would have been quite sufficient for the purpose of admitting proof of the separate debt against the joint estate, it is singular that this should not have occurred to Lord Eldon instead of putting the petitioner, as he did, to prove an assent to the arrangement between the partners, and so to establish that the petitioner and other scheduled creditors had agreed to accept the partnership as their debtor instead of the original debtor.

Judgment.

OSLER
J. A.

Gregory v. Williams, 3 Mer. 582, must be regarded as a case in which there was a trust attaching upon property, and it was so explained by the Court of Appeal in *In re Empress Engineering Co.*, 16 Ch. D. 125, and in *In re Flavell*, 25 Ch. D. 89. So in *Page v. Cox*, 10 Ha. 163, it was held that by the terms of the articles of partnership a trust had been created in favour of the widow in respect of the future share or interest in the partnership to which her husband might be entitled at his decease.

I refer to *Moorehouse v. Bostwick*, 11 A. R. 76, and the observations of three of the members of this Court at pp. 78, 82, 84.

If the plaintiff cannot recover on this ground, then, she is, I think, obliged to shew that there has been a novation of the debt in order to recover upon the footing of a new agreement between herself and the firm. That involves the extinguishment of the old contract and the creation of a new one, the former being usually the consideration of the latter.

The cases no doubt lay it down that very slight circumstances will prove this, and it would be easy to infer from the mere fact that a demand had been made upon the new firm, and that they had paid something on account of the debt, that a novation had taken place and that the separate creditor had consented to accept the liability of the firm in discharge of the separate liability, and that all parties had agreed to treat the debt as a joint one. An express declaration of intention would not be essential. The difficulty I am pressed with here is that the plaintiff's

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J.A.

conduct, and the frame of the present action, are inconsistent with such an intention. She treats the contract on the note as regards both maker and endorser as a continuing one, which, as I read the authorities, cannot be the case if she has accepted the new firm as her debtors, unless indeed there was some other consideration than the discharge of the former agreement for the creation of the new one, and we see nothing of that sort here.

I rely upon *Rolfe v. Flower*, L. R. 1 P. C. 27; *In re India and London Life Assurance Co.*, L. R. 7 Ch. 651; *In re Whitmore*, 3 DeG. & Sm. 565; *Re The Commercial Bank Corporation of India and the East*, 16 W. R. 958, at p. 960 per Wood, L. J.; *Ex parte Lane*, DeG. 300; *Ex parte Freeman*, Buck, 471; *Ex parte Jackson*, 1 Ves. Jr. 130; Lindley on Partnership, 5th ed., pp. 207, 208.

I think the appeal should be allowed.

MACLENNAN, J. A. :—

This is an appeal from a judgment of the Divisional Court of the Queen's Bench Division, reported 14 O. R. 137, where the facts of the case are very fully set forth.

The judgment is rested on the ground of trust, the learned Judge who delivered the judgment of the Court saying, (p. 150): "It may be that the plaintiff could not have maintained an action at law upon this deed, although for her benefit, because she was no party to it, but I think that this is an instance in which the plaintiff is entitled to treat Killey, who exacted the stipulation in this deed, as her trustee, and through him to enforce it," and the learned Judge cites in support of his conclusion Story's Equity, sec. 1250, and the case before Sir William Grant of *Gregory v. Williams*, 3 Mer. 582.

On the argument before us, counsel supported the judgment on other grounds, but I shall first consider the ground on which it was rested in the Court below, namely, that of trust. For this purpose it is necessary to examine the instrument carefully to see what is its true scope and

meaning, and to see whether there are to be found in it those elements which the law recognises as a trust.

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MACLENNAN
J.A.

The case then is, of two persons each carrying on separately the business of ironfounders and manufacturers of steam engines, boilers, and other machinery; each having a separate business establishment, with plant, machinery, tools, &c. These persons determine to unite their two businesses and to carry them on for a time as a single business in partnership, each bringing in as his contribution to the capital of the firm his stock in trade, plant, machinery, tools, &c. The partnership, however, is only intended to continue until a joint stock limited company can be formed for the purpose of taking over the business, and afterwards carrying it on as an incorporated manufacturing company.

This is the purpose for which the agreement in question was formed, and by it Killey transfers to the firm, as his contribution to the capital, "all the assets, property and goodwill of his business, and all contracts and orders now on hand, or which may hereafter be received by him."

The deed further provides that "the property of Killey shall be taken by said copartnership at the valuation recently made and entered in the stock book and inventory of machinery and tools of J. H. Killey & Co., * * subject to the deduction of all liabilities of J. H. Killey & Co., which are to be assumed by the said copartnership and charged against Killey, and of any losses that may accrue, or expenses that may be incurred, in collecting or realizing the outstanding accounts or other debts."

The deed goes on to provide that the parties shall be mutually interested in the business of the said copartnership in proportion to the amounts contributed by them respectively to the capital thereof.

It seems there was a schedule to this deed in which were mentioned ten notes made by Killey to Muirhead on the 14th of November, 1881, including the eight now sued upon, and which were described as some of the liabilities of Killey referred to in the deed, and which were to be assumed by the partnership.

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MACLENNAN
J.A.

It is perfectly evident from the terms of this deed, and the circumstances under, and purposes for, which it was executed, that the parties did not intend thereby to give either Killey or his creditors any security by way of lien or charge either upon the partnership assets generally, or upon those received from Killey. Any such intention would be very improbable, considering that the liabilities would not all be due for two years, that a good part of the partnership assets consisted of plant, tools, machinery, &c., which were for permanent use by the firm, and further, that it was intended to put the business and assets into a company as soon as possible. I think the partnership goods are, under the deed, just as free to be dealt with according to the exigencies of the partnership as if no such liabilities existed, and that the assets brought in by Killey are put on the same footing as those brought in by the Osbornes. It was not intended to sell or dispose of them in any way, or to do anything to provide a fund for the payment of the liabilities so assumed.

So far, therefore, as the assets are concerned the liabilities in question were not placed by the deed in any higher relation to them than any ordinary debts. The partnership was to assume the liabilities, but it was a mere agreement or covenant, and was quite independent of the assets.

As regards an ordinary creditor of a firm, it is settled by the highest authority that the partners are not trustees for him, he has no equity against them or against the assets. In *Kendall v. Hamilton*, 4 App. Cas. at p. 517, Lord Cairns quotes, with approval, a passage from Lord Eldon's judgment in *Ex parte Williams*, 11 Ves. at p. 5, which makes the position clear: "Among partners clear equities subsist, amounting to something like lien. The property is joint; the debts and credits are jointly due. They have equities to discharge each of them from liability, and then to divide the surplus according to their proportions. But, while they remain solvent, and the partnership is going on, the creditor has no equity against the effects of the partnership. He may bring an action against the partners and get judg-

ment, and may execute his judgment against the effects of the partnership. But when he has got them into his hands he has them by force of the execution, as the fruit of the judgment, clearly not in respect of any interest he had in the partnership effects, while he was a mere creditor."

Judgment.

MACLENNAN
J.A.

A trust, as I understand it, is an equitable obligation in respect of property, that is in respect of some specific property. There must be some specific property on which the trust is to attach or operate: *Fleeming v. Howden*, L. R. 1 H. L. (Sc.) 372; *Page v. Cox*, 10 Ha. 163.

I find absolutely nothing in this deed giving either to Killey or to Killey's creditors any claim, legal or equitable, upon the partnership property, and the above authorities shew that the mere fact of being creditors would give no such claim. The proper conclusion, therefore, in my judgment, is that no trust was created by or arose out of the deed of the 29th of February, 1884, in favour of either Killey or his creditors in respect of the notes in question.

If I am right in this conclusion, then it is the case merely of a covenant between Killey and his partners that the firm would pay the notes. I think it is well settled no trust arises out of such an agreement: *Colyear v. Lady Mulgrave*, 2 Keen, at p. 98, cited with approval by Strong, V. C., in *Mulholland v. Merriam*, 19 Gr. at p. 294; *In re Empress Engineering Co.*, 16 Ch. D. at p. 127, per Jessel, M. R.:—"A. being liable to B., C. agrees with A. to pay B., that does not make B. *cestui que trust*;" *In re Rotherham Alum Co.*, 25 Ch. D. at p. 111, per Lindley L. J. "An agreement between A. and B. that B. shall pay C. gives C. no right of action against B. I cannot see that there is in such a case any difference between equity and common law; it is a mere question of contract;" and *Gandy v. Gandy*, 30 Ch. D. at p. 68, per Cotton, L. J.

The high authority of Lord Eldon may also be cited on this branch of the case. In *Ex parte Williams*, Buck, 13, in which the facts were exactly the same as here, the creditor of the individual partner sought to prove against the joint estate, the partners having agreed between

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J.A.

themselves to pay his debt. The case was argued by three of the most eminent equity counsel in England, and if Lord Eldon had conceived that the creditor had become *cestui que trust* by virtue of the agreement the proof would have been allowed at once. But Lord Eldon held that the creditor must make out an agreement with the firm before he could prove.

I think I have shewn that no trust attached to any of this firm's assets in favour of the plaintiff, and if so what is there in the nature of property to which it could attach. It is admitted that a chose in action may be the subject of a trust: Lewin, 8th ed., p. 47. This is the kind of case referred to by Story in section 1250, referred to by the learned Judge, for he goes on to say: "Thus, for example, if a chose in action not negotiable at all, or not negotiable by the local law * * should be passed to an assignee, the latter would be entitled in equity to sue the party liable." The chose here was the covenant between Killey and his partners. If this had been a covenant that the Osbornes would pay Killey's liabilities the authorities cited above shew that no trust would attach to the covenant. Does it make any difference that the covenant is, not that the *Osbornes* shall pay, but that the *partnership* shall assume, or shall pay? On principle I am unable to see how if no trust attaches to the one kind of covenant it should attach to the other. But the case before Lord Eldon, before referred to, is an authority that both cases are alike in this respect.

But even if we were to suppose that a trust did attach to such a covenant, what would be the effect of it? It is a covenant between partners as to something to be done by the firm. It is not a personal undertaking to pay by either of them. Killey could not sue the partners at law. Upon any breach Killey would be as much the offender as the others, and it follows he could establish no personal liability against them at law. The only effect of the covenant, as I conceive, is that Killey could himself apply any money of the firm which might be available to the

payment of the notes as they matured from time to time. ^{4 Judgment.}
 The covenant authorised him to do what would otherwise have been improper, namely, to pay his private debt with the partnership money. But if there were no funds in hand, so that he could not himself pay the note, what remedy had Killey under the deed? As I have shewn he could not sue at law, he could not call on his partners either by action or otherwise personally to pay. His only remedy would be to bring a suit for the dissolution and winding-up of the partnership, in order that this part of their partnership agreement should be carried into effect. Now, if that is all Killey could do, if he could not get a personal order against his partners to pay these notes, how did the plaintiff get into a position to do that? For that is the order that has been made. The Osbornes have been ordered by the judgment to pay these liabilities personally.

MACLENNAN
J.A.

The judgment proceeds on the theory that the plaintiff as *cestui que trust*, through her trustee Killey, has a right to enforce this covenant of the partners amongst themselves. If so then I think it should have been confined to a judgment for dissolution, winding up, and payment of the plaintiff's debt out of Killey's share. That is all Killey could get, and I think that would be the measure of the plaintiff's right, if, as the Court has held, Killey was her trustee, for I do not suppose any one would contend that Killey could under the covenant insist on having these liabilities paid either in priority to or *pari passu* with the ordinary creditors of the firm.

It is curious to observe that under the judgment which the plaintiff has recovered against Killey on the notes, she can obtain the same measure of relief, as she could have obtained through the medium of a trust of the covenant contained in the deed; she can sell his interest in the partnership under her execution, which is the same interest which would be reached the other way.

It is hardly necessary to say anything further on the question of trust but this, that there is here no evidence whatever, as far as I can see, of any assignment to the

Judgment.
MACLENNAN
J.A.

plaintiff of the chose in action, on which alone any trust could attach, nor any evidence that Killey in any other way constituted himself trustee, either express or implied, of that chose in action for the plaintiff.

It remains out of respect to the learned Judges whose judgment is in review to explain why I think the case of *Gregory v. Williams*, 3 Mer. 582, does not govern the present.

The learned Judges consider that in *Gregory v. Williams* the agreement was, not to pay out of property, but to pay generally. As to this I respectfully differ from the learned Judges. I think that the letters written by Williams, when read in connection with the bill of sale, make it apparent that the agreement really was to pay out of property. Goods had been assigned to him, to sell and apply the proceeds to pay what was due to him, and to pay the surplus to Parker the debtor. These goods were not his, they were the goods of the debtor. Williams held them upon trust, and then he writes saying he will pay another debt of his debtor. He could I conceive mean nothing else than he would pay out of the proceeds of the goods. This is the way in which, after careful examination, the case is understood by the Master of Rolls and by the Lords Justices in *In re Empress Engineering Co.*, 16 Ch. D. at pp. 129, 130, and also by Strong, V. C., in *Mulholland v. Merriam*, 19 Gr. 288.

The judgment also lays some stress upon what took place between the parties after the partnership was formed—the application of the plaintiff to the Osbornes for payment, the payment of part, and the negotiations for extension of time,—and it has been argued before us that these circumstances either make out, or help to make out, a trust, or that they amount to an independent agreement by the partners to pay the notes, on which the judgment can be supported.

For the reasons already stated, I am respectfully of opinion that these matters do not make out, or help to make out, a trust of any kind, nor do I think that any independent agreement has been proved.

I am of opinion that to entitle the plaintiff to sue the partners for this debt as upon an agreement by them to pay it, she must prove some consideration for it. The consideration which is usual in such cases is the extinguishment of the claim against the original debtor. There was nothing of that kind here. So far from thinking of giving up or releasing her original debt, this lady continued to present her notes to Killey for payment every three months as they became due, until shortly before the commencement of the action, a period of nearly three years, protested them for non-payment, and notified the endorser of the dishonour. Not only so, but she sued the endorser in this very action on the notes and has recovered, and now holds judgment against him by default. I can hardly imagine anything to prove more clearly or unequivocally than these acts that she never intended to give up, and never did give up, her claim against the original debtor Killey.

Judgment.
MACLENNAN
J.A.

And if the original liability of Killey on the notes remains, there is no other consideration proved, or even suggested, which would support an action against the firm.

I am of opinion, therefore, with great deference, that the appeal should be allowed with costs; that the judgment appealed from should be reversed, and the judgment of the late Chief Justice Cameron at the trial restored.

The Court being divided in opinion, the appeal was dismissed with costs.

An appeal to the Supreme Court of Canada was taken by the defendants, the Osbornes, and on the 14th of June, 1890, judgment was given allowing the appeal, and restoring the judgment of Chief Justice Cameron at the trial.

ANDERSON V. CANADIAN PACIFIC RAILWAY COMPANY.

Railways—Carriers—Destruction of luggage—Act of God—Limitation of action—R. S. C. ch. 109, sec. 27.

Statement.

THIS was an appeal by the defendants from the judgment of the Common Pleas Division, reported 17 O. R. 747, and came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 15th of May, 1890.

Robinson, Q. C., and G. T. Blackstock, for the appellants.

W. Nesbitt, and A. W. Aytoun-Finlay, for the respondent.

The appeal was limited to two grounds: (1) that the accident was caused by the Act of God or *vis major*: (2) that the defendants were protected by the limitation clause, R. S. C. ch. 109, sec. 27, the accident having taken place more than six months before action.

Judgment.

June 28th, 1890. The appeal was dismissed with costs.

As to the first point the Court agreed with the Court below and thought that the finding of the jury was fully justified by the evidence. Upon the second point the appellants also failed, BURTON, and MACLENNAN, JJ. A., adhering to the opinion expressed by them in *McArthur v. The Northern and Pacific Junction R. W. Co.*, 17 A. R. 86, that the section was *ultra vires*, and HAGARTY, C. J. O., and OSLER, J. A., thinking that it did not apply to an action of contract, though not fully discussing the question as such discussion was unnecessary.

DOAN V. MICHIGAN CENTRAL RAILWAY COMPANY.

Negligence—Contributory negligence—Railways—Pleading—"Not Guilty by Statute."

THIS was an appeal by the defendants from the judgment of the Common Pleas Division, reported 18 O. R. 482, and came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A.,) on the 19th of May, 1890.

H. Symons, for the appellants.

G. T. Blackstock, for the respondent.

June 28th, 1890. The Court allowed the appeal with costs and restored the judgment of STREET, J., at the trial. Judgment.

The Court held that evidence of contributory negligence is properly admissible under a defence of "Not Guilty by Statute" without any special plea of contributory negligence, and that at any rate in this case, even if strictly speaking the evidence were not admissible as the pleadings stood, still, it having been given without objection, the plaintiff could not afterwards complain.

The Court also held that, upon the evidence, the finding of the jury as to contributory negligence, was proper and that the action therefore failed.

OWEN SOUND STEAMSHIP COMPANY V. CANADIAN PACIFIC
RAILWAY COMPANY ET AL.

Railways—Joint traffic agreement—Ultra vires.

Statement.

THIS was an appeal by the defendants and a cross-appeal by the plaintiffs from the judgment of the Common Pleas Division, reported 17 O. R. 691, both of which came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A.,) on the 19th and 20th of May, 1890.

D. E. Thomson, Q. C., and *George Bell*, for the plaintiffs.
McCarthy, Q. C., and *G. T. Blackstock*, for the defendants.

Judgment.

June 28th, 1890. [The appeal and cross-appeal were dismissed with costs.

The Court held, for substantially the same reasons as those given in the Court below, that the agreement between the plaintiffs and the Toronto Grey and Bruce Railway Company was a valid agreement, and they therefore did not discuss the question as to the validation of that agreement by the subsequent legislation.

The Court agreed with the Court below upon the question of the termination of the agreement.

THE ERIE AND NIAGARA RAILWAY COMPANY V.
ROUSSEAU ET AL.

Railways—Lands acquired for railway purposes—Statute of Limitations.

A title by possession may be acquired as against a railway company to lands originally obtained by them for railway purposes.

Bobbett v. South Eastern R. W. Co., 9 Q. B. D. 424, approved.

Judgment of FALCONBRIDGE, J., affirmed.

THIS was an appeal from the judgment of FALCONBRIDGE, Statement.
J.

The action was brought by the plaintiffs to recover possession of certain lands in the town of Niagara to which the defendants claimed title by virtue of the Statute of Limitations.

The lands in question were conveyed to the plaintiffs by the Bank of Upper Canada, who were the grantees from the Crown, on the 19th of March, 1866, and the plaintiffs re-conveyed them to the bank by way of mortgage to secure a balance of purchase money. The mortgage not being paid, the trustees of the bank, in whom in consequence of the failure of the bank the mortgaged property had become vested, brought an action for the recovery of the land, and the plaintiffs also brought an action against the trustees (presumably for redemption though this was not shewn in evidence) in which a decree was made by consent on the 15th of September, 1869, vesting the lands in question in certain persons and the trustees of the bank, and directing these persons and the trustees of the bank to execute to the present plaintiffs a lease in perpetuity at a nominal rental of so much of the lands and premises in question in that action as were then actually used and enjoyed by the present plaintiffs for railway purposes, the description including the land in question in the present action. It was not shown that any lease had been executed in pursuance of this decree, and it was admitted that the defendants and their predecessors in title had been in actual and exclusive possession of the land in question for more than twelve years before the commencement of the action.

Statement. The action came on for trial before MACMAHON, J., at St. Catharines on the 15th of October, 1888, when an order was made, by consent, referring the action and all questions therein to SENKLER, Co. J., of the county of Lincoln, who subsequently made a report in favour of the defendants, and an appeal by the plaintiffs from this report was dismissed by FALCONBRIDGE, J.

The plaintiffs appealed, and the appeal came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 21st of May, 1890.

H. Symons, for the appellants. The defendants could not obtain a title by possession to the land in question in this action. This land was leased to the plaintiffs for "railway purposes," and must be held for such purposes and cannot be alienated voluntarily or involuntarily. The plaintiffs could not execute a conveyance which would vest the title in the defendants, or in any way alienate the land, and they cannot therefore by mere acquiescence enable the defendants to acquire title. The property was held by the plaintiffs for a special object of a public character, and they have no power to grant any right in derogation of that object. Strictly speaking the plaintiffs have no title to the land itself, but by the lease were granted merely an easement over it, and the defendants have not acquired title to that easement. Moreover the plaintiffs being lessees, and the reversion having been transferred from the Bank of Upper Canada to the Crown, no title can be acquired under the Statute of Limitations. Assuming, however, that a lease in perpetuity is equivalent to a deed in fee simple, and that the land is held by the railway for railway purposes without any special restrictions, still that amounts to a dedication of the land for railway purposes, and a general Statute of Limitations cannot over-ride the special right acquired by the railway under its Acts. In England railways have power to hold surplus lands and as to surplus lands the Statute of Limitations applies: *Bobbett v. South*

Eastern R. W. Co., 9 Q. B. D. 424. This case has been Argument. relied on by the learned referee, but does not apply because there is no such power in this country, and all lands held by the railway must be held for the purposes of the railway or can be dealt with only for the benefit of the railway.

H. H. Collier, for the respondents. The original estate of the plaintiffs in the land was an estate in fee simple, or what was equivalent to an estate in fee simple: *Capel v. Buszard*, 6 Bing. 150, and therefore nothing passed to the Crown from the Bank of Upper Canada. Even if any interest passed to the Crown that interest is not affected. If the plaintiffs have only an easement as alleged then the action must fail because it is brought to recover possession of the land, and not to restrain interference with an easement: *St. Julian v. Cowley*, 1 C. & P. 123; *Ridout v. Harris*, 17 C. P. 88. The plaintiffs were owners of the land, and the Statute of Limitations clearly applies. In *Bobbett v. South Eastern R. W. Co.*, 9 Q. B. D. 424, it was held that the Statute of Limitations would have applied even if the lands in question had not been surplus lands, and this case is approved in *Norton v. London and North Western R. W. Co.*, 13 Ch. D. 268.

H. Symons, in reply.

June 28th, 1890. The judgment of the Court was delivered by

OSLER, J. A. :—

[The learned Judge stated the facts as above set out, and continued :]

It was not shewn that any lease had been executed in pursuance of the decree, but it may be assumed in the plaintiffs' favour that they have an equitable title to such an interest as would have been conferred upon them by such an instrument as is mentioned in the decree. That at all events is what they rely upon.

Judgment.

OSLER
J.A.

Their first contention is that they acquired under the decree an easement only, over the land in question, of which the possession has not been enjoyed by the defendants for a period long enough to deprive them of it. If this contention was well founded it would be destructive of the action, which is to recover the land, not to restrain the defendants from interfering with the easement. I agree however with the learned referee, that to whatever the plaintiffs resort as the root of their title, whether it be the conveyance from the grantees of the Crown (the Bank of Upper Canada) or the decree, it is the land itself which was conveyed and granted, and not a mere easement over it.

Next they say that the defendants cannot acquire a title by the Statute of Limitations because the plaintiffs are merely lessees, or owners of the land for railway purposes, and that as well by limitation of their statutory powers as by the terms of the lease as defined by the decree they would be unable to alienate the land for other purposes, or to execute a conveyance which would vest any title in the defendants.

The plaintiffs referred to the Act of incorporation of the Erie and Ontario Railway Company, 5 Wm. IV. ch. 19, as containing their charter powers, but as that company afterwards and before the year 1866, appears to have been "vested in and incorporated with" the Erie and Niagara Railway Company, formerly the Fort Erie Railway Company, under the 27 Vic. ch. 59, we must look at the provisions of the latter Act to ascertain the plaintiffs' powers, and among other clauses of the Railway Clauses Act, C. S. C. ch. 66, which are incorporated with and made part of the Act by section 17, is section 9 (2), which empowers the railway company to purchase, hold, and take lands necessary to the construction, maintenance, accommodation, and use of the railway, and also to alienate, sell, and dispose of the same. Even under the Act which incorporated the Erie and Ontario Company, that company are by the first section declared capable, not only of purchasing and holding any estate, &c., for the use of the company, but also, of letting,

selling and otherwise departing therewith for the benefit and on account of the company from time to time as they shall deem necessary and expedient. But as I have said the plaintiffs' powers at the date of the transactions in question seem to have been the (possibly) more extensive ones conferred by the Act 27 Vic. ch. 59.

Judgment.

OSLER
J.A.

It is an entire mis-apprehension of the terms of the decree, and the lease thereby directed to be executed, to suppose that it contains (as argued) a limitation of the purposes for which the land is granted. The words "for railway purposes proper" are merely part of the description of the property granted, *i. e.*, so much of the land now actually used by the Erie and Ontario Railway "for railway purposes proper," that is to say, &c.

There is no evidence that the land in question is part of the permanent way (if that would have made any difference), or essential to the use and enjoyment of the railway as a public concern. Probably as a matter of convenience or even profit it would be useful to the company, and they may have to acquire it again. But I see no reason for believing that they could not have sold it or leased it if they had desired to do so, and that being the case I think they were liable to lose it by the operation of the Statute of Limitations if they permitted or overlooked the defendants' occupation for the necessary period. The case really falls within the express words of the fourth section of the Real Property Limitation Act, R. S. O. (1887) ch. 111. There are no words in the defendants' charter to control the operation of that Act, and in *Bobbett v. South Eastern R. W. Co.*, 9 Q. B. D. 424, it was held by Denman, J., that the mere fact that land of a railway company is required for the purposes of their undertaking, and is not superfluous land, does not prevent an occupier who has had exclusive adverse possession for twelve years from becoming thereby entitled to the land under the Statute of Limitations. No doubt the case did not in the end turn upon that point, but it was very carefully considered by the learned Judge, and the plaintiffs have not in my opinion succeeded in shewing that he was wrong.

Judgment.

OSLER
J.A.

I refer also to *Norton v. London and North Western R. W. Co.*, 13 Ch. D. 268.

The right of the reversioner at the termination of the lease in perpetuity is not a matter which either of the parties need greatly concern themselves with at present.* As regards the plaintiffs' interest in the land I think it is gone, and the appeal should therefore be dismissed. The reasons of appeal suggest that the Limitation Act is *ultra vires* the Provincial Legislature as regards the plaintiffs. I only refer to this to say that the point was not argued, and calls for no observations.

Appeal dismissed with costs.

* See *Doe v. Gardner*, 12 C. B. 319.

CAMERON V. CUSACK.

Fraudulent conveyance—Intent to defeat creditor.

A conveyance made by a debtor, in good faith, of his assets to pay his existing debts, cannot be impeached by one who at the time has a right of action against him for a tort and subsequently recovers judgment, even though the conveyance is made because of the threatened action. Judgment of ROSE, J., 18 O. R. 520, reversed.

THIS was an appeal from the judgment of ROSE, J. *Statement.* reported 18 O. R. 520, upon the trial of an interpleader issue.

The defendant in the interpleader issue was the assignee of a judgment recovered by her father against one A. M. Cameron, for her seduction, and the question involved in the issue was the validity of a certain transfer and assignment of property made by A. M. Cameron to his brother, the plaintiff in the issue, who paid A. M. Cameron \$150, and assumed his liabilities. The cause of action had arisen before the assignment in question was made, but judgment was not recovered until some months afterwards.

The issue was tried before ROSE, J., at St. Thomas, at the Autumn Assizes of 1889. Judgment was reserved, and was subsequently delivered in favour of the defendant, the learned Judge holding that the transaction impeached was entered into with intent to defeat the claim for which the plaintiff's father had recovered judgment.

The plaintiff appealed, and the appeal came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 19th of May, 1890.

J. M. Glenn, for the appellant. The transfer of the property in question to the plaintiff having been made for valuable consideration it was incumbent upon the defendant to prove actual and express intent on the part of A. M. Cameron to defeat delay or defraud William Cusack, who afterwards recovered judgment against him, but the defendant has wholly failed to prove any such intent: May on *Fraudulent Conveyances*, 2nd ed., p. 84; *In re Johnson*,

Argument.

Golden v. Gillam, 20 Ch. D. 389, 51 L. J. Ch. 503. There was no intention to defraud, but only the *bonâ fide* intention to pay the creditors and prevent the assets being wasted. The transaction cannot be attacked as a preference, because it clearly does not come within the Assignments and Preferences Act, R. S. O. (1887), ch. 124, as the defendant was not a creditor at the time of the transaction in question, and the Statute of Elizabeth does not apply to preferences at all. Having therefore the right to prefer particular creditors the assignor must surely have had the right to sell to a stranger who undertook to pay these creditors: *York County Bank v. Carter*, 38 Pa. St. 446, and no inference of an intent to defeat any particular creditor can be drawn from the mere fact that a preference is being given to some other creditor. It was the debtor's duty to pay his trade creditors out of his trade assets, and in endeavouring to provide for their payment he was only acting properly and fairly: *Lewkner v. Freeman*, 1 Eq. Cas. Ab. 148. *Ex parte Mercer*, 17 Q. B. D. 290, governs this case, and is not distinguishable as the learned Judge below holds. That case was really not as strong a case in favour of the assignor as the present case. There there was a mere voluntary settlement made after service of the writ, but yet the debtor's denial of any fraudulent intent was accepted as final. *Barling v. Bishopp*, 29 Beav. 417, relied on in the Court below, is distinguishable. That was a case of a voluntary conveyance made just before the trial, and no explanation whatever was given.

J. S. Robertson, for the respondent. Under the Statute of Elizabeth, as explained by R. S. O. (1887), ch. 96, the mere intention to transfer the property is not enough to support the transaction. Good faith must be shown in addition. It is true that under the Statute of Elizabeth a man may prefer one creditor to another if that is the real purpose of the transaction, but he cannot in preferring one creditor really attempt to defeat another: *Knox v. Traver*, 24 Gr. 477. It is clear that in this case to defeat was the primary object. In *Ex parte Mercer*, 17 Q. B. D. 290,

there was no finding of fact on conflicting evidence as Argument. there is here. *In re Johnson, Golden v. Gillam*, 20 Ch. D. 389, follows the doctrine of *Wood v. Dixie*, 7 Q. B. 892, but *Wood v. Dixie*, and that class of cases, are not law in this country, and moreover in *In re Johnson*, there was a finding of fact against intent.

J. M. Glenn, in reply.

June 28th, 1890. HAGARTY, C.J.O.:—

The evidence in this case consisted merely of the plaintiff and one witness called by him. There was no dispute on the facts, and no question of credibility involved.

I think the learned Judge rightly held that the defendant's action in selling his property was in consequence of his being threatened with the Cusack action, and that he left the country in consequence thereof. But, if we held that the conveyance of his property to plaintiff is to be set aside under 13 Eliz., as explained by our Ontario Act, I think we make a serious inroad on the right of a debtor to convert his property into money for the legitimate purpose of paying all his creditors alike without preference, merely on the ground that the seller is threatened with an action for some tort, the result of which is wholly speculative, both as to its success or defeat, or in the possible amount of damages.

A man may be threatened with actions for libel, slander, trespass to lands, or other like claims. Now he may possibly decide on going to reside in another country, but thinks it right first to pay all his just debts. He may think that his available means can be better employed in paying his existing debts than be frittered away in costly litigation, or swallowed up by some large verdict to be hereafter recovered against him. He does so, and then departs.

I hardly see how such a proceeding can be justly characterized as a fraud or a fraudulent violation of a statute which does not pretend to forbid the paying of one person

Judgment. in preference to another, or to regulate the rights and
HAGARTY duties of the debtor in discharging his liabilities.
C.J.O.

It must be remembered that the vast majority of cases in which conveyances of property have been attacked under this statute have been cases of voluntary settlements. The cases referred to by my brother OSLER deal with the difficulties to be surmounted by those impeaching a conveyance for full value.

When this dealing took place between the brothers, there was no creditor left out. The defendant and her assignor were not creditors.

If he had made an assignment to the plaintiff under our Assignment Act, the defendant would have got nothing, though all the creditors would have had their share. He could have publicly sold all his effects by auction, and beyond possibly getting him arrested on a Judge's order as about to leave the country, the defendant and her father would be powerless. They could not interfere with his disposition of his property.

The remarks of the Judges in *Ex parte Mercer*, 17 Q. B. D. 290, where a voluntary settlement was upheld against a subsequently obtained judgment for damages for breach of promise are very applicable to this case.

I think that we must allow the appeal, as I am unable to hold on the evidence that this transfer of property comes within the statute.

We are not now discussing the merits or demerits of the plaintiff's brother. His conduct as regards the defendant may be, and we must after judgment assume that it was, indefensible. The question is one of importance as to the right of a debtor to apply his property to pay all his actual debts, and must be dealt with on general principles.

OSLER, J. A. :--

The case is admittedly not within the Assignments and Preferences Act, R. S. O. (1887,) ch. 124, and the transaction can only be attacked under 13 Eliz., ch. 5, as explained by

our Provincial Act, R. S. O. (1887) ch. 96, which would seem to have been passed merely for the purpose of declaring that it had not been properly expounded in *Smith v. Moffatt*, 28 U. C. R. 486.

Judgment.

OSLER
J. A.

I take the law to be that if the purchaser knows that the intent of the grantor is to defraud his creditors, the fact that he has paid a valuable consideration, and that the property was intended to pass to him, will not avail him. There must be *bona fides* on his part. That is to say, ignorance of the fraudulent intent on the part of the vendor. Mere intention that the property shall pass, and payment of a valuable consideration, will not save him.

In the present case a valuable consideration was paid by the purchaser (the plaintiff) which was very nearly, if not quite, the real value of the property acquired by him, and there is no doubt that the property was intended to pass to him for his own use, unaffected by any secret trust or reservation in favour of the settlor.

The action in which the judgment now in question was recovered had not then been commenced. The plaintiff therein was not a creditor; his cause of action was for the alleged seduction of his daughter. He was, however, no doubt a person within the prohibition of the statute of Elizabeth, and entitled, on recovering judgment, to attack any transaction devised and contrived to hinder, delay, or defraud him.

The case of *In re Johnson, Golden v. Gillam*, 20 Ch. D. 389, appears to me to have a strong bearing upon the way in which this case should be dealt with.

There one J. by deed of gift granted farming property in trust for her daughters, in consideration of which they agreed to pay the debts incurred by J. up to the date of the deed in managing the farm, and to maintain J. She had no other property, and the plaintiff's debt not having been incurred in connection with the farm, was defeated by the deed. The Court found that the deed was an honestly intended family arrangement, not executed with the object of defeating creditors, and upheld it as valid under the statute.

Judgment.

OSLER
J.A.

I quote the language of Mr. Justice Fry: (p. 392) "It is obvious that the intent of the statute is not to provide equal distribution of the estates of debtors among their creditors, * * * nor is it the intent of this statute to prevent any honest dealing between one man and another, although the result of such dealing may be to delay creditors. * * * The effect on a deed of this sort of its being for good consideration is very great. It does not necessarily shew that the deed may not be void under the statute, because in many cases good consideration has been proved, and yet the object of the deed has been to defeat and delay creditors; * * * and the fact that there has been good consideration will not uphold the deed. But nevertheless it is a material ingredient in considering the case, and for very obvious reasons: the fact that there is valuable consideration shews at once that there may be purposes in the transaction other than the defeating or delaying of creditors, and renders the case, therefore, of those who contest the deed more difficult."

Harman v. Richards, 10 Ha. 89, is referred to and a passage cited from judgment of Turner, L. J.: "Those who undertake to impeach for *mala fides* a deed which has been executed for valuable consideration, have, I think, a task of great difficulty to discharge."

Having given the case all the attention in my power, I feel constrained with great respect for my learned brother Rose, to come to the conclusion that the evidence does not sufficiently establish a fraudulent intent on the part of the grantor as against the presumption of *bona fides* arising from the sale out and out for a valuable consideration, and the disposition of all but a trifling proportion of the purchase money in payment of actual creditors.

The evidence relied on being in small compass, I quote it. After having explained upon the examination in chief, the bargain between his brother and himself, which substantially was that he should give the brother \$150, take all the property, and "pay all liabilities," the plaintiff thus proceeds on his cross-examination:

“Q. When did your brother leave? A. He left in August, a year ago last August.

Judgment.

HIS LORDSHIP.—Q. Where did he go? A. He went to Chicago.

OSLER
J.A.

MR. MACDOUGALL.—Q. Why did he go away? A. Well, he went away to Chicago.

MR. MACDOUGALL.—Q. Why did he go away? A. Well, he went away on account of the reports that were circulated about him that he had seduced Miss Cusack.

Q. He went away because he had seduced Miss Cusack? A. So he told me.

MR. GLENN.—He did not say that.

WITNESS.—He did not say that he had seduced her, but the reports were that he had seduced her, but he denies it.

MR. MACDOUGALL.—Q. You knew he was charged with it, too? A. I heard so.

MR. MACDOUGALL.—But he knew that the action was to be brought against him? A. He did not say anything to me about it.

Q. Did he not go away on account of that? A. I cannot tell you.

HIS LORDSHIP.—We have it so far, he disposed of his business because of these reports, or rather he went away because of these reports.

MR. MACDOUGALL.—You knew he went away on that account, yourself? A. I knew that was his principal cause for going, at least so he told me.

Q. Will you undertake to swear before his Lordship that you did not do this in order to help your brother away? A. No, sir, I did not.

Q. You swear that positively, that you did not? A. I do, sir, I did not want to do it to help him away. I did my best to keep him; I did not want him to go.

Q. What means did you take to ascertain what amount of debts he had? A. I took the statement he gave me there for it.

Q. How about this \$150. How did you arrive at that price for the goods? A. Well, he told me he would take that, if I would give him that, he would take it.

Judgment.

OSLER
J.A.

Q. You had not taken any inventory of the stock, or goods, or put any price upon them yourself? A. No, only just what he told me there was there.

Q. Who made the proposition first that the interest in the goods should be transferred to you? Who was it made the proposition first, or how did it come about? A. I could not say exactly how it came about; he was determined to go.

Q. He was determined to go, and you say you were resisting his going? A. Well, I did not want him to go.

Q. But he was determined to go? A. Yes, sir.

Q. So that the commencement of the negotiations or the bargaining was entirely on his part at the suggestion of Kirkland, that you should take the goods? A. I would not say whether it was his suggestion, forget now whether it was Mr. Kirkland or him that made the suggestion.

Q. But Kirkland was acting with him? A. No, he was there when he says if you are going, he said he wanted to dispose of the goods and get his creditors paid.

Q. In that very conversation that this girl's name was mentioned? A. No, sir.

Q. Was it not talked of? A. No, sir.

Q. This charge against him for seducing? A. No, sir.

Q. An allegation trying to commit an abortion upon the girl? A. No, sir. There was nothing of the kind talked of at the time.

Q. Do you mean to say that in that conversation—in that discussion that you had there, that it was not stated he was going to leave? A. That my brother was going to leave?

Q. Yes. A. Oh, it was understood then; he had made up his mind to go then.

Q. And you knew what for? A. I knew it was on account of this, he told me that he would not stop there any longer.

Q. Now, was it not the fact that you wanted your brother to get away, and you wanted to help your brother away? A. No, sir, I did not.

HIS LORDSHIP.—No, he did not want his brother to go away, that is, as far as there is any action in his mind he would rather have him stay, but his brother desiring to go away, he purchased the goods in order that his brother might get away.

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OSLER
J.A.

WITNESS.—No, sir, he was determined to go any way.

HIS LORDSHIP.—What was to become of his goods if he went away without anyone buying them? What was to become of his stock after he left?

WITNESS.—His creditors I suppose would come and take them.

MR. MACDOUGALL.—Why didn't you permit his creditors to do that? A. I thought there was plenty to pay them.

Q. And then you would undertake to sell them and dispose of them for him so as to pay the creditors? A. I was paying them myself, paying his creditors.

MR. MACDOUGALL.—Just one question. Now, was it not the intention on the part of your brother that this claim of this girl should not be paid? No, sir, not to my knowledge.

Q. Did he ever express himself so to you? A. No, sir, he never mentioned any damages because he did not know
———(Interrupted.)

Q. I am not speaking about damages. Was it not the intention she should not be paid? A. No, sir, nothing spoken about the claim or her claim.

Q. Now, answer the question. Was it not the intention on the part of all concerned, or of your brother, or of yourself, that this girl should not get anything out of that property if it was possible to prevent her from doing so? A. No, sir, it was not my intention at all, nor his intention.

Q. What was his intention as expressed to you? A. He told me he would not stay there, he said he would never conduct another funeral so long as he lived after the like of that getting out against him, he would not stay there any longer, he was determined to go, and the question of defrauding Cusack was never brought up at all

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J.A.

and never thought of on my part; I do not know what was on his.

Q. Did you make any effort whatever to pay the girl or to give her any share of the proceeds of his property?

A. I did not, I did not consider it was his.

Q. And you know that she got judgment against him last January? A. I do.

Q. And you have paid all debts since that? A. I have, sir, I do not consider that a debt.

Q. And therefore you would not pay her anything?

A. No.

HIS LORDSHIP.—Then there was no understanding between you and your brother that she should be paid?

A. No, sir, it was never mentioned; he denies the charge and I take his word for it.

Q. Then so far as you understood his mind at the time, whatever claim that was to be made was a claim which he did not intend to acknowledge or pay? A. A claim that he did not acknowledge at all.

Q. And therefore did not intend to pay? A. Well, it was never brought up, it was never mentioned.

Q. But in so far as your undertaking to pay his debts, you formed the opinion that this was not a debt? A. I never thought of it.

Q. You must have thought of it? A. Of her claim, never thought of it at the time.

Q. Because you knew of the fact, but how far you thought so is another question? A. Never thought of the judgment, of getting the judgment or of the action because I did not know the action was up."

Then there was evidence that immediately after the bargain the plaintiff's brother left the country, and his object being to avoid arrest he no doubt left in such a way as not to attract attention.

What inference should be drawn from this evidence. There is no admission that there was any fraudulent intent in the brother's mind or that anything was said by him to shew that it existed. Had he remained in the country he

could have sold his property just as he did and paid or preferred his creditors (so far as the plaintiff is concerned) with the proceeds. If he had gone away without selling it as it was said he ought to have done, there is no reason to suppose the plaintiff would have been better off, as her judgment was not recovered until the 14th of January, 1889, by which time no doubt all the abandoned assets would have been swallowed up in costs or divided among the existing creditors. If that is what might have happened why should a fraudulent intention be imputed to the party because he sold his goods to his brother and provided for payment of his actual creditors, and left the country? That he intended to abscond must be immaterial because he could have done exactly what he did do had he been arrested and lodged in gaol until the trial, and the defendant could not have interfered.

Judgment.

OSLER
J.A.

The nature of the charge cannot be disregarded in judicially considering the intention of the party. It was uncertain, the damages unliquidated and the truth of it denied. But, whether true or false it was one peculiarly calculated to reflect discredit upon him and make it difficult for him to hold up his head in the neighbourhood. That is the only sworn reason for his going away. It may be admitted that he did not intend to pay the plaintiff's claim, or even to treat it as a liability, yet that is no more than any man does who, where the law does not reach the transaction, prefers one creditor or class of creditors to others, and gives all his property or pays all his money to the former to the exclusion of the latter.

The inference I draw from the evidence is that the intent of the plaintiff's brother was to leave the country because of the charge, whether well or ill founded, making provision for paying his existing debts by selling his property to his brother. I think that is the only evidence of intent we have in the case—all that the plaintiff had notice of. That course would delay and hinder the defendant, but it is not enough to avoid a transaction of which the *bona fides* is in all other respects so plainly shewn.

Judgment.

OSLER
J.A.

For these reasons I am of opinion that the appeal should be allowed.

BURTON, and MACLENNAN, JJ.A., concurred.

Appeal allowed with costs.

ASHLEY V. BROWN.

*Assignments and preferences—Creditor—Knowledge of Insolvency—
R. S. O. (1887) ch. 124.*

One who has a right of action for tort and subsequently recovers judgment is not a creditor within the meaning of the Assignments and Preferences Act, so as to be in a position to attack under that Act, a transaction entered into by the tortfeasor before the action was commenced.

Where a transaction is attacked under that Act, knowledge by the transferee of the insolvency of the transferor must be shown.

Johnson v. Hope, 17 A. R. 10, adhered to.

Judgment of the County Court of Hastings affirmed.

Statement.

THIS was an appeal by the plaintiff from the judgment of the County Court of Hastings in an interpleader issue.

The plaintiff in the issue was an execution creditor of one Brenton, and asserted his right to seize certain chattels which the defendant claimed as having been purchased by him from Brenton on the 21st of March previously.

The action in which the execution was issued was for *crim. con.*, and was commenced on the 25th of March, and tried on the 30th of April. Judgment was granted for \$5,000, the defendant Brenton not having appeared at the trial, having absconded two days previously. Execution was issued on the 4th of May, and the seizure was made on the 10th of May.

The case made by the plaintiff at the trial of the issue was that at the time of the purchase by the defendant on the 21st of March, the defendant was a creditor of Brenton, that the latter was insolvent, and that the transaction was invalid as a fraudulent preference under R. S. O. (1887) ch. 124; and further that it was invalid under R. S. O. ch. (1887)

125, on account of not being in writing, and for want of an *Statement*. immediate delivery followed by an actual and continued change of possession.

Evidence was given of Brenton's indebtedness to a considerable extent at the time of the sale, and of his insolvency.

It was not disputed that at that time the defendant held a note made by Brenton for \$200, and interest, falling due about that time, given for money advanced, and this note was given up at the time of the purchase. There was, however, a dispute whether the note was not first paid in money by Brenton, and the same money then used by the defendant to pay for the property, there being some alleged want of agreement between the defendant's depositions before the trial and his evidence given in open Court on that point.

The learned Judge left it to the jury to say, first, whether the transaction was a *bonâ fide* one, and whether cash was paid for the goods at the time of the purchase; second, whether Brenton was or was not solvent at the time, and whether the transfer was made with intent to give one creditor a preference over others; and lastly, whether there was an immediate and continued change of possession, with directions as to their verdict according to the conclusions they might come to on these points.

The jury gave a general verdict for the plaintiff.

A motion was made on behalf of the defendant in the following term, to set aside this verdict, and for a new trial, or to enter judgment for the defendant, on various grounds, among others, that the transfer complained of did not come within R. S. O. ch. (1887) 124, sec. 2, and that the plaintiff was not a creditor of Brenton at the time of the transfer and had no right to attack it.

The learned Judge held, on the authority of *Johnson v. Hope*, 17 A. R. 10, that there being no evidence of knowledge by the defendant at the time of his purchase of the insolvency of Brenton, or of his inability to pay his debts in full, he ought to have nonsuited the plaintiff at the trial.

Statement.

He also held that as there was an undoubted change of possession before the seizure, though not for some time after the sale, that was sufficient on the authority of *Coats v. Kelly*, 15 A. R. 81, and thinking the case one to which Consol. Rule 755 applied, he directed judgment to be entered for the defendant.

The plaintiff appealed, and the appeal came on to be heard before this Court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 26th of May, 1890.

Moss, Q.C., and *Clute*, Q.C., for the appellant.

Watson, Q.C., and *Redick*, for the respondent.

June 28th, 1890. OSLER, J. A.:—

The plaintiff had a verdict and judgment at the trial, which the learned Judge at the subsequent County Court Sittings set aside, and directed judgment for the defendant on the ground that there was no evidence that on the 21st of March, the date of the transfer of the property seized under the *fi. fa.*, the defendant, the purchaser, knew that the seller was insolvent. That question had not been left to the jury, the parties apparently not having been aware of the decision of this Court in *Johnson v. Hope*, 17 A. R. 10. The learned Judge in the Court below rightly apprehended the effect of that decision, and being of the opinion that there was, in fact, no evidence which could have been properly submitted to the jury of the defendant's knowledge, he was right in entering the judgment for the defendant, notwithstanding the verdict of the jury, since it was in effect merely entering a non-suit for defect of proof of the plaintiff's title.

It was entirely a matter of discretion with him whether he would grant a new trial to enable the plaintiff to supply the defect, and no doubt as some twenty-three witnesses were examined, he would have the means of forming a very competent judgment of the probability of the plaintiff's ability to do so. I think the judgment as entered is right.

But on another ground it is evident that the plaintiff fails. His action was commenced on the 25th of March, 1889. He was not a creditor, but he had a cause of action for *crim. con.* The transaction now impeached took place on the 21st of March, 1889, and though the plaintiff was at liberty to attack it under the Statute of Elizabeth, it is difficult to see that it is open to him to do so under the Assignments and Preferences Act, R. S. O. (1887) ch. 124, which in terms avoids certain transactions by way of preference as to *creditors* only. If the defendant was not a creditor he must, in order to avoid the transaction, rely upon the Statute of Elizabeth and prove that it was devised and contrived to delay, hinder, and defraud him. It is clear, however, that at the most, it was a preference only, which is not avoided by that statute.

Judgment.

 OSLER
J.A.

The appeal must be dismissed.

MACLENNAN, J.A. :—

[The learned Judge stated the facts as above set out, and continued :]

The present plaintiff was not a creditor at the time of the sale to the defendant, and did not become a creditor until about six weeks afterwards when he obtained his judgment against Brenton. He had not even commenced his action when the defendant bought the goods. It is clear, therefore, that the part of the section 2 of the Act which relates to preferences is quite inapplicable to this case. The Statute of Elizabeth speaks of creditors *and others*. The Ontario Statute speaks only of *creditors*. It has been held that the former statute annuls sales and conveyances made with intent to delay, hinder, or defraud future creditors, as well as persons who were creditors at the time of the transaction, for it is evident that a man intending to go into business may put his property out of his hands in order to put it beyond the risks and chances of trade. But I am at a loss to see how there can be a

Judgment.

MACLENNAN

J.A.

preference in respect of a person who is no creditor at all at the time, and who does not become a creditor until long after the act complained of. I, therefore, think that even if the defendant knew of the insolvency of the debtor, the plaintiff could not attack his purchase on the ground of preference.

It was not contended before us that the sale was void under the other part of the section as made with intent to defeat, delay, or prejudice ; but if it had, I think there is no evidence of such intent, and I agree with the learned Judge, that there was no proof of notice or knowledge on the part of the defendant of the debtor's insolvency, or of any fraudulent intent on his part, and that in that respect our decision in *Johnson v. Hope*, 17 A. R. 10, is applicable.

As regards the change of possession, I agree with the learned Judge also, that the uncontradicted evidence shews a complete change of possession when Brenton absconded and before the trial of the plaintiff's action, and long before the issue of the execution.

Upon the whole case I think there was nothing proved in this case which could properly be left to the jury to support a verdict for the plaintiff, and that judgment ought to have been for the defendant as found by the learned Judge in the judgment appealed against, and that the appeal should be dismissed.

HAGARTY, C.J.O., and BURTON, J.A., concurred.

Appeal dismissed with costs.

BONISTEEL V. SAYLOR.

Contract—Bills of Exchange and Promissory Notes—Illegality—Public policy.

The plaintiff purchased from an alleged company fifteen bushels of hull-less oats paying therefor \$10 a bushel and receiving the company's bond to sell for him thirty bushels of oats at the same price. The company found in the defendant a purchaser of thirty bushels of oats and the plaintiff's oats were sold to him and the defendant's notes for \$300 were transferred to the plaintiff, the defendant getting the company's bond to sell sixty bushels for him at the same price. This was but one of a very large number of 'similar transactions' and both the plaintiff and the defendant were aware of this, and that these transactions could not be carried out without some one else being induced to enter into a similar transaction by which their own would be completed and a loss probably suffered by their successors. The oats were not worth more than ordinary oats and the transactions were in fact speculative and fraudulent :—

Held, [BURTON, J. A., dissenting], that the transaction could not be dealt with as an isolated one, but that the whole scheme must be looked at ; that the tendency of that scheme was clearly contrary to the general well being of the public and therefore that the transaction in question forming part of that scheme was against public policy and illegal, and that the plaintiff could not recover the amount of the notes given by the defendant.

Judgment of the County Court of Hastings affirmed on other grounds.

THIS was an appeal from the judgment of the County Statement Court of Hastings.

The action was brought upon two notes made by the defendant for \$150 each, payable, on or before the 1st day of January, 1890, to W. W. Hess or bearer, and transferred to the plaintiff under the following circumstances.

There was an alleged company called the Crawford, Henry and Williams County Seed Company, said to have been incorporated under the laws of the State of Ohio on the 1st of September, 1885, for the production and sale of grain and seeds. Their operations in the County of Hastings were carried on by a man named W. W. Hess with the aid of others who like the parties to the present action dealt with him. The nature and connection of these operations one with another are sufficiently illustrated by that in which the plaintiff and defendant were more immediately concerned. In 1888 the company through Hess delivered to Bonisteel 15 bushels of hull-less oats, which for

Statement.

commercial purposes were admittedly not worth more in the market than any other good quality of oats, but the price of which they agreed with Bonisteel should be \$10 per bushel, and Hess took from him his promissory note for \$150, giving him in return a bond or agreement to sell for him 30 bushels at \$10 a bushel, in the following form :

A BOND.

No.

Capital Stock \$100,000.00.

BRANCH OFFICE, BELLEVILLE, O.

THE CRAWFORD, HENRY AND WILLIAMS COUNTY SEED
COMPANY.

Incorporated under the laws of Ohio, Sept. 1st, 1885.

For the production and sale of Grain and Seeds.

It is agreed and understood by and between the parties named in this Bond and said Company, that the transaction covered by this obligation is of a speculative character, and is not based upon the real value of the grain.

KNOW ALL MEN BY THESE PRESENTS, That the Crawford, Henry and Williams County Seed Company, do hereby agree to sell bushels of hull-less oats for Mr. , at \$10 per bushel, less 25 per cent. commission, on or before of .

IN TESTIMONY WHEREOF the said Crawford, Henry and Williams County Seed Company, has caused this Bond to be signed and sealed by the Secretary of said Company, this day of .

This Company will not be held responsible for any outside contracts made by agents other than those expressed on face of this bond.

THE CRAWFORD, HENRY AND WILLIAMS COUNTY SEED Co.,
Per O. H. Brasington.

This Bond is void without the Company's seal and signature of the Secretary.

BY-LAWS OF THE CRAWFORD, HENRY AND WILLIAMS Statement.
COUNTY SEED Co.

SECTION 1ST.—All bonds shall be signed and sealed by Secretary of the Company, and the By-laws on the back of said Bonds attested by the President of said Company, and this Company will be responsible for their business transactions according to laws made and provided for governing Stock Companies in the State of Ohio, and under which this company was incorporated.

2nd.—The members of this Corporation do hereby agree that if any one purchasing grain of the said Company for seed, and sown by said purchaser, by any unavoidable cause, namely, fire, drouth, floods, &c., does not possess the amount called for in said Bond issued by said Company, then said company agrees to furnish the amount called for in said Bond, and sell the same as specified in the Bond.

3rd.—This Company will only bond the same variety of grain one year to the same individual.

4th.—All bonds of said Company shall be redeemed before any surplus grain is sold, and as soon as said bonds are redeemed, then each purchaser of grain from this Company shall have the right to sell all grain grown by him from seed purchased from said Company.

5th.—It must be further agreed by said purchaser that he will do all he can to promote the sale of grain, and the interest of the Company, and that he will report to the office of the said Company any bad conduct or misdemeanour on the part of any agent representing said Company.

A. P. WITHAN, *President.*

Any person desiring information regarding this Company, address, W. W. HESS, Belleville, Ont.

Bonisteel sowed his grain, raised his crop of 30 bushels or more, and when the time arrived for the performance of the bond the company or Hess had found in Saylor another party to the scheme who was willing to buy 30 bushels of oats at \$10 a bushel and to give his notes for

Statement. \$300 therefor, and to take the company's bond to sell for him 60 bushels at \$10 a bushel. Bonisteel then, at the request of Hess, transferred the 30 bushels, which the company had agreed to sell for him, to Saylor in satisfaction of the latter's purchase from the company, and the company handed over to Bonisteel Saylor's notes for \$300 in discharge of their obligation to him, he paying them in cash the commission and charges which he had agreed to pay them for selling his oats.

The defendant set up that the notes were obtained by fraud and without consideration, and were transferred to the plaintiff without consideration after they became due and with actual notice and knowledge of the fraud, and, also, that the whole transaction was fraudulent and void as against public policy. The defendant also set up that the notes were made by him in consideration of the bond or agreement of the company being carried out, that the bond or agreement had not been carried out, and that therefore the notes were void.

The action was tried before the Junior Judge of the county of Hastings on the 19th of March, 1890, and judgment was subsequently delivered, giving effect to the objection last mentioned, and dismissing the action without costs. It was not shown at the trial whether the company was really incorporated or not, but there was evidence that at all events, even if incorporated, it was not incorporated for any real commercial or agricultural purpose, but solely for the purpose of such transactions as were in question in the action. It was also shown that the present transaction was one of several hundreds that had been entered into in the county of Hastings, and that each party to every one of these transactions knew of their nature and knew that they could not be carried out without some one else being induced to enter into a similar one by means of which his own would be completed and the danger of loss thrown upon his successor.

The plaintiff appealed, and the appeal came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 26th and 27th of May, 1890. Argument.

Moss, Q. C., and J. H. Simpson, for the appellant. The appellant is an innocent holder for valuable consideration of the notes sued upon, and took them before they were due, and without any notice of fraud. The appellant had nothing whatever to do with the company except in regard to this single transaction, and should not suffer because of the failure of the company to redeem their bond to the defendant, to which the plaintiff was not a party, and which in any event had nothing whatever to do with the notes sued upon. The learned Judge was in error in holding that the bond of the company given to the defendant, and the notes made by the defendant in favour of the company, are one and the same transaction. There was no bargain or agreement between the defendant and the company that the performance of the obligation of the bond should be a condition precedent to payment of the notes. On the contrary, the notes and the bond were and are independent transactions.

Clute, Q. C., for the respondent. The appellant acted really as an agent of the company in the transaction entered into by the defendant, and took part in it. From the evidence it clearly appears that the whole transaction was illegal and void. Such a transaction as the present is manifestly against public policy. One transaction cannot be enforced without some one else being defrauded, and the principle of a contract being void as against public policy applies: *McNamara v. Gargett*, 36 N. W. R. 218; *Davis v. Seeley*, 38 N. W. R. 901; *Shirley's L. C.*, pp. 120, 121, 122; *Egerton v. Earl Brownlow*, 4 H. L. C. pp. 144 to 151; *Gooderham v. Hutchison*, 5 C. P. 241; *Bank of Montreal v. Cameron*, 17 U. C. R. 636.

Moss, Q. C., in reply. No question of public policy is involved in this case. It is simply a transaction between the company and the defendant, and is in itself perfectly

Argument. valid. Public policy is not to be invoked to aid persons who enter into an admittedly speculative transaction. The transaction could not be impeached even as between the original parties, much less as against an innocent transferee : Pollock on Contracts, 5th ed., p. 298 ; *Rice v. Gunn*, 4 O. R. 579. Even if the transaction is illegal, still as the plaintiff can make out his case without disclosing the illegality of the transaction, the defendant cannot set up that illegality as a defence : *Day v. Day*, 17 A. R. 157, and cases there cited.¹

June 28th, 1890. HAGARTY, C.J.O. :—

The defendant's notes are payable to W. W. Hess, or bearer, dated 2nd of November, 1888, payable on or before 1st of January, 1890.

I think it impossible to regard the plaintiff Bonisteel in the position of an innocent holder for value, as he is shewn to have had the fullest notice and knowledge of the whole dealing between the defendant and Hess, the company's agent, and to have been an actor in the transaction.

Robertson, for the company, sold the oats to the defendant. The plaintiff was then, and had been for some time, a dealer with the company. He had also given his notes and held their bond. He arranged with Robertson to take the defendant's notes which had just been signed by him, and to deliver to him, for the company, the 30 bushels of oats which the latter by the bond or agreement of November 2nd, the same date as the notes, were to give to the defendant.

The plaintiff signed the memorandum dated on the next day (November 3rd), agreeing to make this delivery to the defendant on or before 1st of January following.

Robertson told the plaintiff all of this. The plaintiff had the company's bond falling due that fall, as Robertson says : " He wanted his bond raised, and if he got the defendant's notes he considered it perfectly good, and they, the notes, would take up his bond."

The plaintiff says he got the notes from Hess, who told him to take the thirty bushels to the defendant, which he did.

Judgment.

HAGARTY
C.J.O.

The plaintiff had raised a large quantity of these oats from seed got in like manner from the company and under the bond had a claim of \$300 against them. He says: "I took Mr. Saylor's notes in settlement by paying \$150 commission, which I took out of these two notes."

The bond and the notes are properly admitted to have been one transaction, and the number "29" appears on both bond and notes.

It was conceded all round, that these "hull-less oats" were in no respect more valuable than ordinary oats, the market price of which during these two years was, at most, fifty cents per bushel.

The astonishing feature of this case is how, after the experience of one harvest, it was possible to base any contract respecting their purchase or sale on any higher sum, much less on a stated value two thousand per cent. over actual known value.

We start with the declaration by this alleged bond: "It is agreed and understood by and between the parties named in this bond that the transaction covered by this obligation is of a speculative character, and is not based upon the real value of the grain."

It is therefore declared to be wholly a speculative dealing with an article of produce wholly apart from its true or market value.

When this bargain was made the oats had been tested and their value found to be the same as ordinary grain. The consideration for which the defendant gave his notes was thirty bushels at \$10 per bushel, and the company's bargain to find a purchaser for double the quantity at same rate.

Who was such purchaser to be? Dupe, Knave, or Confederate? It could hardly be a dupe after the known and proved worthlessness of the grain—it must therefore be some one like the plaintiff, anxious to make cent. per cent.

Judgment.
HAGARTY
C.J.O.

(less commission) on the purchase, and so on with each successive purchaser until the happening of one of two events—the total failure of purchasers or investors, or the more probable event of the exhalation or bursting of the bubble company which happened apparently a year too soon, to the defendant's grief and discomfiture.

It is not necessary in every case to designate parties like the defendant as dishonest. They trusted wholly to the company's ability to find purchasers at the same preposterous price which they paid. It would seem to be equally impossible that the company could continue to discharge its bonds, dependent as it must be on the supply of purchasers.

Their continued solvency must wholly depend on the continued supply of an investor like the defendant, whether he be simply designated as a dupe, or as a person willing to join the company in this wild speculative trickery. After the proved worthlessness of the oats beyond ordinary grain, it seems impossible to consider future purchasers in any other light than joint adventurers with the company in a dishonest adventure.

The learned Judge in the Court below points out a noteworthy matter as to the connexion between each purchaser and the company.

“One of the many iniquitous features of this company is to make it a part of the agreement, on behalf of the purchaser, to ‘do all he can to promote the sale of grain and the interest of the company.’ Thus in order to secure the sale of his own grain, he is compelled to endeavour to dupe his neighbours. He is to puff the company, thus making him perhaps the unwilling instrument to promote its own fraudulent aims.”

The peculiar character of this case certainly leaves it open to strong language and most unfavourable comment.

The learned Judge suggests from the evidence that this company would, in the course of say five years, be required to sell 128,000 bushels at \$10, being \$1,280,000, and at the end of the ninth year over 2,000,000 bushels, amounting to over \$20,000,000.

This is to shew the enormous extent to which such operations could be carried, and the amount of grain required, and the pecuniary liabilities to be created, as also the certain failure when purchasers ceased.

Judgment.

HAGARTY
C.J.O.

It has been suggested that we should look on this case as an isolated transaction between the immediate parties, irrespective of any dealings with others. I do not see how it is possible so to do. We have to examine the true nature of the transaction in all its bearings, and to consider how far the arguments urged in defence on the ground of illegality, public policy, &c., may be sound.

We have not merely to decide a simple case where A. sells to B. a brick or a block of wood worth a penny for the price of five shillings, agreeing to buy it back from him a year after at the price of ten shillings. Stopping there, there may be no valid objection to such a foolish bargain. But we have for judgment a vast scheme involving the sale of hundreds of such blocks or bricks, the original vendor contracting in all cases to find purchasers for every block at ten shillings, and the dealing is spread over a large community, and contemplates the annual finding of purchasers from year to year. We have to consider whether such an enterprize can be upheld in our Courts.

The adventure must end, as it has ended, in disaster, and in the end a very large number of the community be left with heavy liabilities, and no one to share the burden, or purchase their worthless grain.

I hardly think it is an answer that the company only dealt with those willing to join in the adventure, seduced by the hope of large profits.

The tendency of the whole scheme must naturally be contrary to the general well-being of the public and most injurious to the public morals and conscience, and ending in widespread disaster and loss.

We have been referred to the judgments of some of the American Courts as to bargains of this character.

In some of the States it has been found necessary to forbid and declare void and criminal all such bargains as to oats or other grains.

Judgment.

HAGARTY
C.J.O.

Some of the cases were before the passing of these enactments.

It is not necessary to adopt them as expressing our opinion, but I am not prepared to dissent from the general view expressed.

I refer to one case, *McNamara v. Gargett*, 36 N. W. R. 218, an action on a note like that before us. "Griffith (the payee) knew that these oats * * could not be sold legitimately for more than any other oats, and that they could not be sold for \$10 a bushel in any legitimate and lawful transaction; that the only way in which they could be so sold was by the perpetration of another and similar fraud upon some other unsuspecting victim to his acts and wiles. The contract is one that Gargett could not have enforced, had Griffith failed to call for and sell the oats. In such cases the Courts must leave the parties where it finds them. * * The contract is that Griffith shall sell for Gargett fifty bushels of his (Gargett's) oats at \$10 per bushel on or before, &c. No man can, in legal contemplation force the sale of another's property by a given day, or by any day, by his own act." See also *Sutton v. Beckwith*, 36 N. W. R. 79; *Davis v. Seeley*, 38 N. W. R. 901.

The very learned Chief Justice Shaw says in *Fuller v. Dame*, 18 Pick. at p. 481: "The law goes further than merely to annul contracts, where the obvious and avowed purpose is to do or cause the doing of unlawful acts; it avoids contracts and promises made with a view to place one under wrong influences, those which offer him a temptation to do that which may injuriously affect the rights and interests of third persons."

Lord Hardwicke says: "The truth is that in those cases of violation of public policy, it is indifferent who stands before the Court, if the intention of the contract be evident, because the Court does not regard the state and condition of the parties so much as the nature of the contract and the public good:" *Gilbert v. Chudleigh*, cited in the notes to *Hatch v. Hatch*, 9 Ves. (Sumner's ed.,) at p.

299. In *Benyon v. Nettlefold*, 3 Mac. & G. at p. 192, the Lord Chancellor says: "It must be remembered, however, that the law in sanctioning such a defence (illegality in a bond) does not do so out of favour to the party urging it, but on the grounds of public policy, namely, that those who violate the law must not apply to the law for protection." He is not speaking of any statutable illegality.

Judgment.

HAGARTY
C.J.O.

Begbie v. Phosphate Sewage Co., L. R. 10 Q. B. 491, affirmed 1 Q. B. D. 679, may be referred to for the remarks of Cockburn, C. J., at p. 497. It was held that money could not be recovered back which was paid in a transaction one of the objects or effects of which would be to defraud intending shareholders in a company to be formed, who would be led to believe that an exclusive right would be acquired when it was known that any such right could not be acquired.

It has been often laid down that in construing a contract, it is its tendency and not its result that has to be considered: *Gilbert v. Sykes*, 16 East at p. 158; *Eltham v. Kingsman*, 1 B. & Ald. at p. 687, and very fully discussed in the great case of *Egerton v. Earl Brownlow*, 4 H. L. C. 1, especially in Lord Brougham's judgment at p. 174: "The tendency is alone to be considered, and unless the possibility is so remote as to justify us in affirming that there is no tendency at all, the point is conceded."

Lord Truro (p. 196): "Exceptions have been made to the expression 'public policy,' and it has been confounded with what may be termed political policy. * * Public policy, in relation to this question, is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed, as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law."

Lord Lyndhurst (p. 160), cites Lord Hardwicke's language in *Earl of Chesterfield v. Jansen*, 1 Atk. 352: "Though there may be no *dolus malus* in contracts as to other persons, yet if the rest of mankind are concerned as

Judgment.

HAGARTY
C.J.O.

well as the parties, it may properly be said that it regards the public utility."

Chief Baron Pollock (at p. 144) vindicates the "Public policy" theory in very strong language: "An unlimited number of cases may be cited as directly and distinctly deciding upon contracts and covenants on the avowed broad ground of the public good, and on that alone; and the name and authority of nearly all the great lawyers will be found associated with this doctrine in some shape or other."

I may refer also to such cases as *De Begnis v. Armistead*, 10 Bing. 107; *Ayerst v. Jenkins*, L. R. 16 Eq. 275; *Hanington v. Du Chatel*, 1 Bro. C. C. 124.

I fully concur in the remarks often made as to the wisdom of refusing to extend the so called doctrine of public policy beyond its legitimate sphere of application, and the language of Sir George Jessel in *Printing Co. v. Sampson*, L. R. 19 Eq. 462, cited by one of my learned brothers, will be accepted by every judge and lawyer as sound and wise, especially in reference to the extraordinary attempt in the case before him to extend that doctrine.

A doctrine which leaves to the peculiar view of each particular judge what may be wholesome or beneficial to the community at large, may well be open to most hostile comment.

I am content to accept the true principle governing its application in the clear definition and analysis of the eminent jurists who have discussed it in such cases as those to which I have referred.

On the trial of this case before a jury I think the main question to be determined in the first instance would be whether the business carried on by Hess on behalf of an alleged American company was an undertaking in good faith to carry on a lawful operation in dealing with this grain, or was a mere dishonest speculation bottomed in fraud and reckless of consequence or injury to those with whom its dealings might be.

If the answer to this question be to the latter effect,

which appears to me as it did to the trial Judge to be the proper conclusion, and if, as already pointed out, the present plaintiff is completely identified with the payee Hess in knowledge of the whole facts of the case, I do not at present see how the aid of a Court of Justice can be properly given to enforce the contract with the defendant.

Judgment.

HAGARTY
C.J.O.

The latter is not deserving of any sympathy.

He is allowed by law to spread this defence before us, and to ask whether the claim made against him can be enforced. That he may be *in pari delicto* is no reason why the aid of the Court should be given to his opponent.

I am unable to decide the case on the ground taken in the Court below, as to the failure of consideration from the non-performance of the so-called bond.

The two contracts, though parts of the same transaction, would seem to be independent. Making the bond payable a month before the notes, would at first seem to be in favour of the maker, and could be used as an argument to convince him of his security being available before his liability matured.

The transfer of the notes to a third person might have the effect of preventing (though not necessarily) a counter-claim on the maker's part.

The learned Judge below was so much struck by the unfavourable proceedings of the alleged company as to apply to them and their confederates, the apostrophe once applied by Chief Justice Wilmot : "*Procul, O procul este, profani!*"

I certainly think it is not wholly inapplicable. The plaintiff would doubtless prefer that we should adopt and act on the old saying: "*Populus vult decipi-et decipiatur!*"

I think the appeal should be dismissed, but without costs.

OSLER, J. A. :—

It is conceded that the only ground of defence open to the defendant is that of illegality, and that the particular nature of the illegality relied on is that the note is part and parcel of a transaction which is void as opposed to

Judgment.

OSLER
J.A.

public policy. A recent annotator well remarks that in dealing with cases of this kind, "the Courts are not distributing a kind of equity differing with the length of each Judge's foot, but are acting on certain well known principles and maxims, such as *Salus populi suprema lex: Nihil quod est inconveniens est licitum: Sic utere tuo ut alienum non laedas, &c.*:" Shirley's L. C. p. 50.

I quite agree that if there was nothing before us but the fact that the defendant had chosen to give the plaintiff his promissory notes amounting to \$300 for thirty bushels of oats at \$10 the bushel, the oats being to the knowledge of both parties intrinsically worth no more than ordinary oats or say 40 cents to 50 cents per bushel, he could have no claim to the assistance of the Court. All that could be said of him would be that he had chosen to enter into a foolish bargain and must abide by it.

But upon the fullest consideration of the evidence I am of opinion that this is too narrow a view to take of a transaction, the real features of which, as the evidence presents them to me, I shall endeavour briefly to describe.

[The learned Judge stated the facts as already set out and continued:]

Each dealing consisted of the note and bond, and the evidence admits of no doubt that each party to every one of them knew that they could not be carried out without some one else being induced to enter into a similar one by means of which his own would be completed and a loss probably suffered by his successor. Each party too, knew that he was engaged in no honest commercial dealing with grain, but in one which could only be fulfilled by some one else either entering into a similar contract with his eyes open, or by being duped by the alleged company or one of their agents into doing so. It is the apparent isolation of each contract, lending it an air of mere harmless folly, in which the ingenuity of the scheme consists. But the isolation is apparent only, and when this is made clear its harmful tendency is not far to seek.

In *Jones v. Randall*, 1 Cowp. 37, it is said, "contracts

not prohibited by positive laws nor adjudged illegal by precedent may nevertheless be void as against principle." And in the great leading modern case on the subject, *Egerton v. Earl Brownlow*, 4 H. L. C. 1, it is laid down that contracts are illegal from their tendency to promote unlawful acts without regard to any circumstances which go to affect the probability of such acts being done. I have not succeeded in finding any later cases in which it has been suggested that too wide a limit has been set in that case to the mode in which Courts are to deal with public policy as affecting the legality of contracts, or in which the opinions of the Judges have been unfavourably criticised, and when we compare the venial character of the fault which vitiated the condition of the will in question in that case with the frauds and other evil results likely to flow from and to be connected with the contract in this, I am not afraid of being told that the doctrines and rules of that case are being misapplied in holding that the plaintiff ought not to be suffered to recover. I may refer to Pollock on Contracts, 5th ed., p. 298; Anson on Contracts, 5th ed., p. 190, where the subject is very fully discussed.

Judgment.

OSLER
J.A.

It appears to me that the direct tendency of the business of the company, consisting as it did of transactions of which that now in question is one, was to promote and encourage fraud and fraudulent dealings, and to inflict injury and loss upon a large portion of the community. Were the case an isolated one we might smile at the folly of the parties, but when it developes itself as part of an organized business, it is the tendency which I have referred to which makes every one who hears of it denounce it, and every phase of it, as a swindle.

With the intimate knowledge which the evidence discloses each party to have had of the nature of the business, and the deliberate undertaking of each to "promote the sale of grain and the interests of the company," it is in my opinion impossible to say that each contract is not tainted with the vice of the whole business of which it forms part. Though as between the immediate parties it may, as in

Judgment.

OSLER
J.A.

this instance, be free from actual fraud in the sense of imposition, it is nevertheless void and illegal, because on the ground and for the reasons I have specified, it is contrary to public policy that such contracts should be permitted or enforced. When every one admits that the business as a whole, and in its results, is a swindle, I think we cannot be charged with introducing an "unsatisfactory vagueness" into the law, by holding that the agreements which are the life of it are contrary to public policy, and we may safely hold them to be so without contravening that paramount public policy, as Sir George Jessel calls it, "that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred, and shall be enforced by Courts of justice."

By refusing to enforce the contract now in question we are only declaring that the parties have not a sacred right to aid in carrying on a business which has a direct tendency to the commission of fraud, and which is fraught with such injurious consequences to the public.

It can hardly be necessary to say that one is reluctant to assist a defendant who has taken the benefit, and now disclaims the burden, of the transaction.

Collins v. Blantern, 2 Wils. 341, and *Fletcher v. Lord Sondes*, 3 Bing. 501, are remarkable instances in which the Courts gave effect to the defence of illegality on the ground of public policy, although in one case the defendant was escaping from a liability, and in the other retaining a valuable property.

The defendant has the right to urge the defence of illegality, and when proved, we are bound to give effect to it as we do by dismissing the appeal. As, however, we do so on a different ground from that on which the learned Judge below dismissed the action, we may mark our sense of the defendant's demerits by dismissing it without costs.

MACLENNAN, J. A. :—

Judgment.

MACLENNAN
J.A.

I agree entirely in the judgment of the learned Chief Justice.

I think the business, in which Hess and the company, or pretended company, which he professed to represent, were engaged, was nothing but a cunningly devised scheme of fraud, having in it none of the elements of legitimate trade or business. It is perfectly evident that the transaction with the plaintiff could not be carried out without somebody being cheated and swindled sooner or later. In order to its success some one must be induced to buy thirty bushels of oats at \$10 a bushel, while their real value was not and could not be more than 50 cents a bushel, and either he or some other foolish person must lose his money. It is plain that every time the transaction was repeated the magnitude of the undertaking of Hess or the company to find purchasers at the fictitious price, was increasing in a geometrical ratio, and that failure was inevitable. On its very face the business was a swindle, as transparent, and hardly as plausible, as many of the ordinary tricks of card sharpers and confidence men of which we have heard. And it is to be regretted that there were found numerous persons at once so simple and so greedy of gain as to lend themselves to transactions which could plainly only end in disaster to themselves or others.

It is impossible also not to see an element of deliberate wickedness, on the part not merely of Hess and his confederates who contrived the swindle, but on the part of every one who like the plaintiff and the defendant allowed themselves to take part in it, for they all proposed to themselves large gains at the expense of others. While they saw plainly enough that some one must be cheated each hoped it would not be himself.

Now, if as I think the business was a swindling scheme, the plaintiff and the defendant lent themselves to it, and became parties to it. The purchases they made, and the notes they gave, were in furtherance of it, and were merely so many steps in the fraud.

Judgment.

MACLENNAN
J.A.

The plaintiff had full knowledge of the nature of the scheme, and that the notes in question were given by the defendant in furtherance of it. It is true the plaintiff delivered thirty bushels of oats to the defendant as the ostensible consideration for the notes, but that delivery also was part of the swindle, and I do not think it entitles the plaintiff to recover.

I think that on the making of the notes by the defendant, and the delivery of them to the plaintiff, both the plaintiff and the defendant were knowingly engaged in promoting a business necessarily mischievous and injurious to the public, and calculated and intended to defraud persons who might, and who were expected to, become their dupes. I think the defendant and the plaintiff are equally to blame; that they are both equally foolish and wicked, and that the law applicable to such cases requires us to afford no assistance to either of them, but to leave them in the position in which they have placed themselves.

BURTON, J.A.:—

I most fully agree in the strong expressions of condemnation of the transactions of the company and its agents referred to in the statement of defence, and regret that the Legislature, which we were told had been applied to, had not interfered for the suppression of such practices, although the delusive character of the transaction is so apparent that they might well consider that the most simple person could not be deceived, and no legislation was therefore necessary. Such, at all events, was not the case with either of the parties to this litigation, who were fully aware of what they were doing, and it is their rights and liabilities upon which we are adjudicating in this action.

I am at a loss to understand what defence this defendant can be heard to urge to the plaintiff's demand.

It is a habit with me, which I have frequently found very useful, to consider how the defendant would have formulated his defence on the old system of pleading, and

I think any one would find it very difficult to frame a plea which would stand the test of a demurrer. The defendant could not plead with any hope of success that the note was obtained from him by fraud, for he went into the transaction with his eyes open, and after several days for deliberation. Neither can he, nor does he, pretend to urge that any misrepresentations were made to him by the company ; but it is now contended that it is against public policy—a very wide, and not a very satisfactory attempt at a solution—one to which I am most unwilling to give effect, inasmuch as if held to apply, the result must be that this defendant, although a *particeps criminis*, will not be debarred from setting up his own iniquity in order to be relieved from a liability deliberately entered into.

Judgment.

BURTON
J.A.

I can quite understand that rule applying where the plaintiff founds his cause of action upon an agreement or a note the consideration of which is *contra bonos mores* or a transgression of a positive law. I might concede for the purpose of the argument that a bond entered into by a person to act as the agent of this company in carrying out such transactions as are contemplated under their scheme of operations, and to recover a commission for his services, would be illegal and not enforceable in a Court of justice, but that would not be by any means decisive of this case.

The contract to sell to this defendant 30 bushels of oats at an extravagant price was not in itself illegal if the defendant without any misrepresentation was foolish enough to enter into it, nor is the plaintiff precluded from recovering upon it, because he knew all the facts and had committed a similar folly himself. It is said that by entering into his own contract he had agreed to do all he could to promote the sale of grain and the interests of the company, but he had nothing to do with promoting the sale to the defendant, and there is a broad distinction between a mere mental purpose that an illegal act shall be done, and a participation in the unlawful transaction : *Hobbs v. Henning*, 17 C. B. N. S. at p. 819, referring to *Holman v. John-*

Judgment.

BURTON

J.A.

son, 1 Cowp. 341, and *Lightfoot v. Tenant*, 1 Bos. & P. 554. The sale to the defendant was made by the company, the plaintiff had nothing to do with it, but the sale having been made he delivered the grain in pursuance of it.

I think that the note might have been enforced in the hands of the company. The agreement, and not the performance of it by the company, was looked upon by the defendant as the consideration of the note, and it is perfectly clear, I think, that if sued upon the agreement, the company would have had no answer.

The decision so frequently referred to of *Egerton v. Earl Brownlow*, 4 H. L. C. 1, decided nothing more than this, that the limitations in the will then in question were held bad because they amounted in effect to a gift of pecuniary means to be used in obtaining a peerage, and offered a direct temptation to the improper use of such means, and had a manifest tendency to the prejudice of good government and the administration of public affairs; but all transactions which have that character, are alike void, such as champerty and maintenance, the compounding of offences, and the sale of offices; that was the decision, although some of the expressed opinions would seem to go further. But where there is no statutory prohibition the law will not readily pronounce a contract invalid on the ground of policy, and is on the contrary inclined to leave men free to regulate their affairs as they think proper.

Regret has frequently been expressed at the tendency of some decisions (which have followed the dicta of some of the Judges in *Egerton v. Earl Brownlow*, 4 H. L. C. 1, rather than the judgment itself), and would seem to hold that solemn contracts, not in themselves transgressing any positive rule of law, are yet held to be void by reason of some constructive illegality or supposed tendency to contravene public policy. It seems to me to be far wiser to leave Parliament to say what is and what is not a contravention of public policy, and, (Mr. Shirley's criticism to the contrary notwithstanding), the inclination of the Courts at the present day is not to make such a question depend upon the mere private discretion

of the majority of a Court on a point of all others most open to a difference of opinion and most liable to be affected by changing circumstances, or as it has been sometimes expressed in somewhat broader terms, leaving the Courts to distribute a kind of equity differing with the length of each Judge's foot.

Judgment.

BURTON
J.A.

These decisions it is true do not meet with much favour at the present day and the tendency of modern decisions is against the invention of new heads of public policy, and in the language of Sir George Jessel: (*Printing Co. v. Sampson*, L. R. 19 Eq. at p. 495,) "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract."

There could scarcely be a case to which this language could be more applicable than the present—where we find two sharp business men fully alive to what they were doing, voluntarily entering into this contract. In the case of a dupe the ordinary plea of fraud and misrepresentation would be a defence, and if desirable Parliament might be applied to for a remedy, but I confess I feel the strongest repugnance to assisting this defendant to repudiate a liability solemnly entered into, as if he were a child of tender years.

But I refer again to Sir George Jessel's language upon this question of public policy, for the purpose of showing the disinclination of the Courts to extend the rule, and to show that a contract of this nature (although the whole scheme might be of a character which a Court of justice would not enforce), does not fall within it. "Now," he says, "there is no doubt public policy may say that

Judgment.
BURTON
J.A.

a contract to commit a crime or a contract to give a reward to another to commit a crime is necessarily void. The decisions have gone further, and contracts to commit an immoral offence, or to give money or reward to another to commit an immoral offence, or to induce another to do something against the general rules of morality, though far more indefinite than the previous class, have always been held to be void. I should be sorry to extend the doctrine much further." It appears to me that we should be extending the doctrine very much further if we held this contract to come within it.

Sir William Anson remarks that the policy of the law or public policy is a phrase of frequent occurrence, and has a somewhat attractive sound, but it may very easily introduce an unsatisfactory vagueness into the law, and refers to its having been applied, and not always with the happiest results, during the early part of the present century, and then adds that modern decisions have tended to limit the sphere within which the duty of the courts to consider the public advantage may be exercised, and refers to Sir George Jessel's as perhaps the best expression of the modern view, and he then proceeds to arrange such contracts as are against public policy under seven heads.

1. Agreements which injure the state in its relations with other states.

2. Agreements tending to injure the public service.

3. Agreements which tend to prevent the course of justice.

4. Agreements which tend to the abuse of legal process.

5. Agreements which are contrary to good morals, but he also points out that the only aspect of immorality with which the courts of law have dealt is sexual immorality.

6. Agreements which affect the freedom or security of marriage.

And lastly, agreements in restraint of trade.

Under which of those heads is it proposed to place this transaction?

I have read the learned Judge's judgment several times

without being able to appreciate very clearly the grounds of his decision. To call this scheme a swindle, or the promoters of it common cheats, does not aid us to the conclusion that this particular transaction is something against public policy, nor do I think that the maxim, "*Ex turpi causâ non oritur actio*" applies to the contract sued on in this action. Even if it had been shewn that the plaintiff had carried out the stipulation that he should act as agent of the company, I should have doubted its application, but if that additional element would have affected the question, there is no evidence that he so acted, and it will not be presumed that he did so. The contrary is the proper inference.

I am of opinion, therefore, that the appeal should be allowed, and the judgment entered for the plaintiff.

Judgment.

BURTON
J.A.

Appeal dismissed without costs,
BURTON, J. A., *dissenting.*

GOODMAN V. BOYES.

Statute of Limitations—Acknowledgment of debt.

An acknowledgment of a debt, not being a debt by specialty, to be sufficient under the Statute of Limitations, must be made to the creditor or to his agent. A general acknowledgment of liability, or an acknowledgment to a third person, is not sufficient.

Judgment of the County Court of Wentworth affirmed.

Statement.

THIS was an appeal from the judgment of the County Court of Wentworth.

The action was brought by the plaintiff to recover from the defendant the sum of \$102 received by the defendant under the following circumstances :

One Armstrong was a tenant of one Maria Webber and in October, 1883, she gave to the defendant, who was bailiff of the seventh Division Court of the county of Wentworth, a warrant to distrain upon Armstrong for rent and taxes in arrear. The defendant executed the distress warrant upon Armstrong's goods and chattels, and on the 10th of October, 1883, sold them. After payment of the rent and costs there remained in his hands \$102. About the time of the sale Armstrong absconded from the country, and very shortly afterwards a number of actions were brought against him in the seventh Division Court of the county of Wentworth as an absconding debtor, the warrants of attachment being directed to the defendant as bailiff. To these warrants the defendant made the following return endorsed thereon :

“Inventory of the property and effects attached this 28th day of November, 1883.

The pro rata interest in \$102, being surplus over and above moneys required to satisfy the rent claim and costs, and now in my hands.

(Signed)

J. D. BOYES, Bailiff.”

These actions were disposed of by the Judge of the Division Court on the 15th of April, 1884 ; six of them on the ground that the Clerk had not signed the warrants of

attachment so that they were "wholly worthless and no proceedings could be legally taken upon them"; another on the ground that the absence of the seal to the warrant rendered it also worthless; and four others on the ground that the affidavits of service were insufficient. As to all the cases it was further held that the surplus money in the bailiff's hands was not attachable under the warrants, so that the actions were all dismissed and judgment of nonsuit was entered. Statement.

On the 3rd of October, 1889, Armstrong having returned to this country, assigned his claim to the plaintiff, who commenced this action on the 15th of October, 1889. By the statement of defence the defendant denied that he held any balance for Armstrong, and alleged that if there was any balance he held it for Armstrong's creditors under writs of attachment which had been issued against Armstrong as an absconding debtor. The Statute of Limitations was also pleaded.

The action came on for trial before MUIR, J.J., on the 1st of April, 1890, and on the 17th of April, 1890, he delivered judgment dismissing the action on the ground that under the Act, 2 Wm. & M. Sess. 1, ch. 5, sec. 1, an action would not lie against the bailiff or broker for the overplus or surplus proceeds of goods distrained, but that this overplus or surplus should have been left in the hands of one of the officers mentioned in the Act, viz., the sheriff, under-sheriff, or constable, and that the tenant's only remedy was an action against the landlord for not complying with the provisions of the Act. He also held that the claim was barred by the Statute of Limitations.

The plaintiff appealed, and the appeal came on to be heard before this Court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.), on the 27th of May, 1890.

Teetzel, Q.C., for the appellant.

W. Bell, for the respondent.

Judgment. June 28th, 1890. OSLER, J.A. :—

OSLER
J.A.

[The learned Judge stated the facts as above set out and continued:]

It is quite unnecessary for the disposition of this case to consider the application of the Statute of William and Mary. No defence of that kind was pleaded, or apparently suggested at the trial, and as the defendant has the money in his hands and it is the proceeds of the tenant's own goods and there is really no reason, from what we see of the attachment proceedings, to suppose that any claim can be supported under them, the case is not one in which the Court is called upon to be astute in aiding the defendant to defeat an honest claim. If the Act is in force an amendment would appear to be called for to simplify proceedings and prevent injustice in the future. Assuming therefore, though not deciding, that but for the Statute of Limitations an action would, under the circumstances, lie against the defendant to recover the moneys in his hands, the question is whether the return made by him to the warrants of attachment (for that is the only thing relied upon) is a sufficient acknowledgment of liability to take the case out of the statute, and the difficulty which meets the plaintiff on the threshold is, that the acknowledgment, such as it is, was not made to Armstrong, nor to anyone for him. In Addison on Contracts, 8th ed., p. 1262, it is laid down in the same way as it was in the 4th ed., that an acknowledgment to a third party is sufficient, but none of the modern cases are cited. And in Banning on the Limitation of Actions it is said to be still unsettled, or not to be finally decided, whether an acknowledgment to a third party is sufficient. Both on principle and authority however, notwithstanding some conflicting decisions, (see *Beard v. Ketchum*, 5 U. C. R. 114), such an acknowledgment is clearly insufficient, and we must take the law to be as laid down in *Edwards v. Culley*, 4 H. & N. 377. Pollock, C.B., there says: "There must be an acknowledgment amounting to a promise, either to the creditor or his agent, to pay the debt."

Martin, B.: "We must always go back to the words of the statute (9 Geo. IV. ch. 14; R. S. O. (1887) ch. 123, sec. 1) and they are that 'no acknowledgment or promise by words only shall be deemed sufficient evidence of a *new* or *continuing contract*, &c., unless such acknowledgment or promise shall be in writing.' It is therefore clear from the words of the Act that the acknowledgment must be such as to have that effect, and I think that the word 'promise' shews that there must be a promise to the person to whom the acknowledgment is made. A statement to a third person, like the insertion in a schedule of the debt, would not be that species of acknowledgment which the statute contemplates."

Judgment.

OSLER
J.A.

Bramwell, B., cites *Grenfell v. Girdlestone*, 2 Y. & C. 676, to the same effect and says: "I agree that an admission to a third person would not be sufficient."

The same thing is laid down in one of the most recent cases on the subject, *Green v. Humphreys*, 26 Ch. D. 474. Fry, L. J., says: "Now what is an acknowledgment? In my view an acknowledgment is an admission by the writer that there is a debt owing by him, either to the receiver of the letter or to some other person on whose behalf the letter is received." See also *Fuller v. Redman*, 26 Beav. 614; *Shanly v. Grand Junction R. W. Co.*, 4 O. R. 156; Wood on the Limitation of Actions, sec. 79. As regards a specialty debt the acknowledgment to a stranger would seem to be sufficient under the Statute applicable to it: 3 & 4 Wm. IV. ch. 42, sec. 5; (Imp. Act.) R. S. O. (1887) ch. 60, sec. 8; *Moodie v. Bannister*, 4 Drew. 432; *Forsyth v. Bristowe*, 8 Exch. 716. In the case before us the acknowledgment relied on was made, not to Armstrong nor with any intention of admitting a debt or liability to Armstrong in the sense of a promise to pay him, but the contrary. At the most it is a mere admission to the creditor that he the defendant has a sum of money in his hands of which a "pro rata" part has been attached under the warrant. It is impossible to infer from

Judgment.

OSLER
J.A.

such an admission a promise to pay the money to Armstrong.

Other recent cases on the subject of acknowledgment are *Meyerhoff v. Froehlich*, 4 C. P. D. 63; *In re Bethell*, *Bethell v. Bethell*, 34 Ch. D. 561.

It was also argued that the legal effect of the endorsement on the warrant was to constitute the defendant an express trustee of the money for Armstrong. But if he was not a trustee in respect of the money in the first instance, so that the statute was running in his favour from the time he received it, his subsequent admission to a third person that he held it not for Armstrong but for such third person cannot convert him into a trustee for Armstrong.

I think the appeal must be dismissed; but for myself I must add that I see nothing in the Division Court proceedings which prevents the defendant from being as honest as his counsel assured us he wished to be. It is a sheer evasion to speak of the attachments as being in the way. If the defendant is still Clerk of the Court it may be that his superiors have the means of persuading him, if persuasion is needed, to do what is right.

If the defendant does not pay the amount to the plaintiff, the plaintiff's money lying in his hands and the remedy merely being barred, I think that no order should be made as to costs, and the defendant will be able to pay himself out of the moneys in his hands.

HAGARTY, C.J.O., and BURTON, J.A., concurred.

MACLENNAN, J. A. :—

On 10th of October, 1883, the defendant as the bailiff of one Maria Webber, sold goods of one James Armstrong for rent, and there was on that day a surplus in his hands of the proceeds of the sale after satisfying the rent due and expenses, of \$102.

The present action was brought by the plaintiff on the

15th of October, 1889, as assignee of James Armstrong, to recover this sum of \$102 as money had and received, and the statement of claim also charges a wrongful seizure of the goods under colour of the distress warrant to the value of \$102.

Judgment.
MACLENNAN
J.A.

In considering the appeal this last claim may be disregarded, as there was no evidence to support it, and it was not contended that in distraining, selling, or receiving the proceeds of sale the defendant had been guilty of any irregularity or excess or other tortious act.

I am clearly of opinion that there are two grounds on which this action fails and on which the appeal must be dismissed.

The first is that the defendant being a mere agent of the landlady, Maria Webber, and having done no wrong, there was no privity between him and James Armstrong, and he could not be sued by the latter. It was the landlady who alone under the circumstances could be pursued for the surplus, and the defendant was answerable to her and not to Armstrong. On this ground I come to the conclusion that the defendant was not originally liable to Armstrong, and there is nothing to shew that he became or made himself liable by any thing which he did or which occurred subsequently.

The other ground on which the appeal must fail is the Statute of Limitations. It was contended that an endorsement made by the defendant on certain Division Court process on the 28th of November, 1883, was such an acknowledgment as would give a new starting point for the statute, but I am clear that the acknowledgment is not sufficient for that purpose, not being one from which a promise to pay the money to Armstrong could be implied.

The appeal should be dismissed with costs.

Appeal dismissed without costs.

APPENDIX.

The following appeals from the Court of Appeal for Ontario in cases reported in 16 A. R. and 17 A. R. have been decided by the Supreme Court of Canada :

Jones v. Grand Trunk R. W. Co., 16 A. R. 37. Appeal dismissed with costs, June 14th, 1889.

In re Clarke and the Union Fire Ins. Co., 16 A. R. 161. Appeal dismissed with costs, June 12th, 1890.

Ryan v. Clarkson, 16 A. R. 311. Appeal dismissed with costs, June 12th, 1890.

Bond v. Conmee, 16 A. R. 398. Appeal dismissed with costs, March 19th, 1890.

Henderson v. Killey, 17 A. R. 456. Appeal allowed with costs and judgment of Chief Justice Cameron at the trial restored, June 14th, 1890.

A DIGEST
OF
ALL THE CASES REPORTED IN THIS VOLUME.
BEING DECISIONS IN THE
COURT OF APPEAL FOR ONTARIO.

ACCEPTANCE OF OFFICE.

See TRUSTS AND TRUSTEES, 1.

ACKNOWLEDGMENT OF DEBT.

See STATUTE OF LIMITATIONS.

ACT OF GOD.

See *Anderson v. Canadian Pacific R. W. Co.*, 480.

ACTUAL ADVANCE.

See ASSIGNMENTS AND PREFERENCES, 1.

AFFIDAVIT OF BONA FIDES.

See BILLS OF SALE AND CHATTEL MORTGAGES.

ASSESSMENT AND TAXES.

See CONSTITUTIONAL LAW, 2 —
COVENANTS FOR TITLE.

ASSIGNMENT.

Equitable assignment—Chose in action—Bills of exchange.]—One E., who had a contract with the defendant for certain carpenter's work, gave to the plaintiff an order on the defendant in the following form:—

"Please pay to H. the sum of \$138.40 for flooring supplied to your buildings on D. road, and charge to my account."

Held, that this was not an equitable assignment, but a bill of exchange, and that in the absence of written acceptance by her, the defendant was not liable.

Judgment of the County Court of York reversed. *Hall v. Prittie*, 306.

ASSIGNMENTS AND PREFERENCES.

1. *Bills of sale and chattel mortgages—Actual advance—R. S. O. ch. 124, secs. 2, 3—Notice to solicitor.*]—A solicitor, acting for a creditor, obtained for the debtor on the security of a chattel mortgage a loan

from another client who was ignorant of the purpose for which the loan was required. The solicitor, by direction of the debtor, out of the moneys advanced paid off the creditor in full and shortly afterwards the debtor assigned:—

Held, affirming the judgment of the Chancery Division, 17 O. R. 290, that the mortgage was one to secure a present actual *bonâ fide* advance, and could not be impeached.

Stoddart v. Wilson, 16 O. R. 17, questioned.

The question of notice to the solicitor as affecting the client discussed. *Gibbons v. Wilson*, 1.

2. *Bankruptcy and insolvency—Bills of sale and chattel mortgages—Mortgage to secure moneys paid by mortgagee to creditor—Intent to prefer—Notice of insolvency—R. S. O. ch. 124, sec. 2.*—A transaction entered into by a person in insolvent circumstances is not impeachable unless the person claiming the benefit of the transaction had notice or knowledge of the insolvency and did not act in good faith.

A security given by a person in insolvent circumstances to secure an actual advance made without notice or knowledge of the insolvency, and in good faith, is not impeachable because the moneys advanced are, pursuant to the direction of the insolvent, paid over to one of his creditors, who thereby obtains a preference.

Stoddart v. Wilson, 16 O. R. 17, disapproved.

Judgment of the County Court of Hastings reversed. *Johnson v. Hope*, 10.

3. *Creditor—Knowledge of Insolvency—R. S. O. (1887) ch. 124.*—One who has a right of action for

tort and subsequently recovers judgment is not a creditor within the meaning of the Assignments and Preferences Act, so as to be in a position to attack under that Act, a transaction entered into by the tortfeasor before the action was commenced.

Where a transaction is attacked under that Act, knowledge by the transferee of the insolvency of the transferor must be shown.

Johnson v. Hope, 17 A. R. 10, adhered to.

Judgment of the County Court of Hastings affirmed. *Ashley v. Brown*, 500.

BANKING AND INCORPORATION OF BANKS.

See CONSTITUTIONAL LAW, 2.

BANKRUPTCY AND INSOLVENCY.

See ASSIGNMENTS AND PREFERENCES, 2, 3.—CONSTITUTIONAL LAW, 2.

BARRISTER AND SOLICITOR.

Law Society—R. S. O. ch. 145, secs. 36, 44—Disciplinary jurisdiction—Evidence not under oath—Discipline committee—Notice of meeting.—By sec. 44 of R. S. O. ch. 145, "An Act respecting the Law Society of Upper Canada," whenever a barrister or solicitor has been or may be found guilty of professional misconduct by the Benchers, "after due enquiry by a committee of their number or otherwise," it shall be lawful for the Benchers in Convocation to disbar any such barrister,

and, by sec. 36 of that Act, upon any enquiry by committee the Benchers or committee shall have power to examine witnesses under oath.

Upon a charge of professional misconduct, the plaintiff attended before the Discipline Committee, the Standing Committee of Convocation to whom all charges of such nature are referred, and without objection allowed witnesses to make unsworn statements, and cross-examined them thereon, he also making an unsworn statement himself.

In calling the committee together, no notice of the meeting was sent to the treasurer of the Society, an *ex officio* member thereof, he being in Europe, and the notice to the other members did not state the purpose of the meeting. Subsequently the committee reported to Convocation that the complaint had been fully established, and recommended that the plaintiff be disbarred. Upon the consideration of this report the evidence was read before Convocation, and the plaintiff appeared with counsel and practically admitted the charge taking no objections to the proceedings, whereupon Convocation adopted the report and resolved that he be disbarred, &c. An action to have this resolution declared void, and to restrain further proceedings, was dismissed by BOYD, C., (16 O. R. 625.) This judgment was subsequently reversed by the Queen's Bench Divisional Court, (17 O. R. 300), whereupon the defendants appealed to this Court:—

Held, (reversing the decision of the Divisional Court) that the plaintiff having appeared before Convocation and substantially admitted the charge, and the propriety of the report of the committee, could not be permitted to say that the defen-

dants had acted without "due enquiry," or to set up any irregularities there might have been in the preliminary proceedings.

Per HAGARTY, C. J. O., and OSLER, J. A. The power to take evidence under oath was, unless waived, imperative.

Per HAGARTY, C. J. O., and OSLER, J. A., also:—Notice to the treasurer was unnecessary.

Per BURTON, J. A.—The power to take evidence under oath was discretionary. *Hands v. The Law Society of Upper Canada*, 41.

BENCHER.

See LAW SOCIETY.

BENEVOLENT SOCIETY.

See LIFE INSURANCE.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See ASSIGNMENT—CONTRACT, 2.

BILLS OF SALE AND CHATTEL MORTGAGES.

Affidavit of bona fides—*Description of chattels*—*Concurrent mortgages*.]—The affidavit of *bona fides* in a chattel mortgage taken to secure the mortgagee against his endorsement of two promissory notes, which were referred to in a recital, stated that the mortgage "was executed in good faith and for the express purpose of securing me the said mortgagee therein named, against his endorsement of a certain promissory notes for (*sic*) or any re-

newal of the said recited promissory notes."

Held, that "his endorsement" might be read "my endorsement," as this was clearly a clerical error, but that even with this correction the clause remained vague and incomplete, and that the affidavit was therefore fatally defective.

Held, also (*HAGARTY, C. J. O.*, dissenting), that the mortgagee was entitled to fall back on a previous mortgage covering the same chattels, given to secure him against his endorsement of certain notes, of one of which one of the two notes referred to in the later mortgage was a renewal, there being evidence that when the later mortgage was takēn it was not intended to abandon the earlier one.

McMartin v. McDougall, 10 U.C. R. 399, commented on.

Boulton v. Smith, 17 U.C.R. 400; in Appeal, 18 U. C. R. 458, referred to.

Smale v. Burr, L. R. 8 C. P. 64; *Ramsden v. Lupton*, L. R. 9 Q. B. 17, distinguished.

What is a sufficient description of chattels and animals discussed.

Judgment of the County Court of Hastings varied. *Boldrick v. Ryan*, 253.

See ASSIGNMENTS AND PREFERENCES, 1, 2.

BREACH OF TRUST.

See TRUSTS AND TRUSTEES, 2.

BRITISH NORTH AMERICA ACT.

See CONSTITUTIONAL LAW, 1, 2.

BRIDGES.

See MUNICIPAL CORPORATIONS, 1.

BY-LAW.

See INTOXICATING LIQUORS, 1.

CALLS.

See COMPANY.

CARRIERS.

See Anderson v. Fish, 28—*Anderson v. Canadian Pacific R. W. Co.*, 480.

CASES.

Bobbett v. South Eastern R. W. Co., 9 Q.B.D. 424, approved.]—*See* RAILWAYS, 3.

Boulton v. Smith, 17 U. C. R. 400, in appeal 18 U. C. R. 458, referred to.]—*See* BILLS OF SALE AND CHATTEL MORTGAGES.

De visme v. De visme, 1 Mac. & G. 352, observed upon as being no longer authority.]—*See* SALE OF LAND.

In re Empress Engineering Company, 16 Ch. D. 125, specially considered.]—*See* PARTNERSHIP.

Gregory v. Williams, 3 Mer. 582, specially considered.]—*See* PARTNERSHIP.

Johnson v. Hope, 17 A. R. 10, adhered to.]—*See* ASSIGNMENTS AND PREFERENCES, 3.

McMartin v. McDougall, 10 U.C. R. 399, commented on.]—*See* **BILLS OF SALE AND CHATTEL MORTGAGES.**

Re O'Heron, 11 P. R. 422, overruled.]—*See* **LIFE INSURANCE.**

Ramsden v. Lupton, L. R. 9 Q.B. 17, distinguished.]—*See* **BILLS OF SALE AND CHATTEL MORTGAGES.**

Russell v. Russell, 14 Ch. D. 471, distinguished.]—*See* **MASTER AND SERVANT.**

Smale v. Burr, L. R. 8 C. P. 64, distinguished.]—*See* **BILLS OF SALE AND CHATTEL MORTGAGES.**

Stoddart v. Wilson, 16 O. R. 17, questioned.]—*See* **ASSIGNMENTS AND PREFERENCES, 1.**

Stoddart v. Wilson, 16 O. R. 17, disapproved.]—*See* **ASSIGNMENTS AND PREFERENCES, 2.**

Trigerson v. Board of Police of Cobourg, 6 O. S. 405, approved and followed.]—*See* **JUSTICE OF THE PEACE.**

CHOSE IN ACTION.

See **ASSIGNMENT.**

COMPANY.

Shareholder — Calls — Surrender of shares — Cancellation of shares — Compromise — Invalid resolution.]—A trading corporation has authority as an incident of its existence to compromise all *bonâ fide* claims made against it, and therefore has power to compromise claims made by a shareholder to be relieved of his shares either by reason of fraud or

misrepresentation or any other cause which would enable the Court to decree such relief; but as the Court, if a shareholder were to make a claim against the corporation for compensation in damages in respect of some matter not connected in any way with the validity of the shares held by him, could not decree a cancellation *pro tanto* of those shares, so the corporation itself cannot validly compromise a claim for damages against it by accepting the surrender of and by cancelling shares of its capital stock held by the claimant.

Judgment of the Common Pleas Division reversed. *Livingstone v. Temperance Colonization Society*, 379.

COMPROMISE.

See **COMPANY.**

CONSIGNOR AND CONSIGNEE.

See *Anderson v. Fish*, 28.

CONSTITUTIONAL LAW.

1. *Criminal law—Criminal procedure—B. N. A. Act, sec. 91, subsec. 27—51 Vic. ch. 32 (O.)—52 Vic. ch. 15 (O.)*]—The “Act to provide against frauds in the supplying of milk to cheese or butter manufactories,” 51 Vic. ch. 32 (O.), though penal in its nature, does not deal with criminal law within the meaning of section 91, sub-section 27, of the B. N. A. Act, but merely protects private rights and is *intra vires*.
So also the “Act respecting appeals on prosecutions to enforce penalties and punish offences under

Provincial Acts," 52 Vic. ch. 15 (O.), is not legislation dealing with criminal procedure within the meaning of that sub-section and is *intra vires*.

Judgment of the Queen's Bench Division, 17 O. R. 58, reversed.

Whether proceedings to quash a conviction under an Ontario Act should be taken before a single Judge, or a Divisional Court. *Quere. Regina v. Wason*, 221.

2. *British North America Act—Bankruptcy and Insolvency—Banking and Incorporation of banks—Property and civil rights—Crown—Taxation—Tax sale—R. S. O. (1887) ch. 193, sec. 7, sub-sec. 1.*—Certain lands, after the grant from the Crown, became by certain mesne conveyances the property of the Bank of Upper Canada and upon the failure of that bank were conveyed to its trustees, and were subsequently, with the other assets of the bank, vested in the Crown by 33 Vic. ch. 40 (D.) The Crown then sold them and the purchaser gave a mortgage back to secure part of the purchase money. The mortgage contained the usual provision for payment of taxes, but the taxes were not paid and the lands were sold, this action being brought to set aside the tax sale.

Held, per HAGARTY, C. J. O., and OSLER, J. A., that the Act, 33 Vic. ch. 40 (D.), was *intra vires*, as dealing with "Bankruptcy and Insolvency" or "Banking and Incorporation of Banks." That the lands were therefore properly vested in the Crown as trustee, and that the interest of the Crown as mortgagee and trustee could not be sold for arrears of taxes, but was exempt under R. S. O. (1887) ch. 193, sec. 7, sub-sec. 1.

Per BURTON, J. A. That the Act was *ultra vires* as an interference with "Property and Civil Rights in the Province" and that the lands remained in the trustees subject to taxation. That even if the Act was *intra vires* still the lands, being vested in the Crown in the place and stead of the trustees voluntarily selected by the shareholders of the bank, were not exempt from taxation.

Per MACLENNAN, J. A. That the Act was *ultra vires* and the lands subject to taxation, but that, upon the evidence, the sale was fraudulent and void as far as the interest of the Crown was concerned.

The judgment of the Queen's Bench Division, 17 O. R. 615, was therefore affirmed, BURTON, J. A., dissenting. *Regina v. County of Wellington*, 421.

See RAILWAYS, 1.

CONTRACT.

1. *Master and servant—Parent and child.*—The plaintiff, while a child of very tender years, had been placed by her father with the defendant, who was not a relation, to remain with him until she attained eighteen years of age, he agreeing to support her during that time, to send her to school, to supply her with clothing, and to give to her certain articles when she reached the age of eighteen. She remained with the defendant until she was nearly twenty years of age, being in all respects treated as a member of the family, and doing such work as a member of the family would naturally do.

Held, that the plaintiff had no implied right to remuneration for

services rendered after she attained the age of eighteen, and that in the absence of any express agreement for payment of wages, she could not recover.

Judgment of the County Court of Elgin reversed. *Peckham v. Depotty*, 273.

2. *Bills of exchange and promissory notes — Illegality — Public policy.*]—The plaintiff purchased from an alleged company bushels of hullless oats paying therefor \$10 a bushel and receiving the company's bond to sell for him thirty bushels of oats at the same price. The company found in the defendant a purchaser of thirty bushels of oats and the plaintiff's oats were sold to him and the defendant's notes for \$300 were transferred to the plaintiff, the defendant getting the company's bond to sell sixty bushels for him at the same price. This was but one of a very large number of similar transactions and both the plaintiff and the defendant were aware of this, and that these transactions could not be carried out without some one else being induced to enter into a similar transaction by which their own would be completed and a loss probably suffered by their successors. The oats were not worth more than ordinary oats and the transactions were in fact speculative and fraudulent.

Held, [BURTON, J. A., dissenting], that the transaction could not be dealt with as an isolated one, but that the whole scheme must be looked at; that the tendency of that scheme was clearly contrary to the general well being of the public and therefore that the transaction in question forming part of that scheme was against public policy and illegal, and that the plaintiff could not

recover the amount of the notes given by the defendant.

Judgment of the County Court of Hastings affirmed on other grounds. *Bonisteel v. Saylor*, 505.

See Grant v. The Peoples Loan and Deposit Company, 85.—*Temperance Colonization Society v. Fairfield*, 205.—*The Electric Despatch Company of Toronto v. The Bell Telephone Company of Canada*, 292.

See DAMAGES—SALE OF LAND.

CONTRIBUTORY NEGLIGENCE.

See Doan v. Michigan Central Railway Co., 481.

CONVICTION.

See CONSTITUTIONAL LAW, 1.]—*JUSTICE OF THE PEACE.*

COVENANT.

See The Electric Despatch Company of Toronto v. The Bell Telephone Company of Canada, 292.

COVENANTS FOR TITLE.

Local improvement rates].—The defendant joined in a petition to a municipal council to pass a by-law to open a street through the property of the defendant and others under the local improvement clauses of the Municipal Act. The petition was adopted and a by-law passed under which the work petitioned for was done. Subsequently the defendant sold his land to the plaintiffs and conveyed it to them by deed made

in pursuance of the Act respecting Short Forms of Conveyances, containing the statutory covenants for title. A rate to pay for the improvements, payable in ten annual instalments, but subject to commutation, was imposed afterwards upon the land benefited, including that sold by the defendant.

Held, affirming the judgment of the Chancery Division, 18 O. R. 151, that the rate was an encumbrance created in part by the action of the defendant, and that the plaintiffs were entitled to recover damages under the covenants for quiet enjoyment and against encumbrances, the amount recoverable being the smallest amount necessary to discharge the encumbrance. *Cumberland v. Kearns*, 281.

CREDITOR.

See ASSIGNMENTS AND PREFERENCES, 3.

CRIMINAL LAW.

See CONSTITUTIONAL LAW, 1.

CRIMINAL PROCEDURE.

See CONSTITUTIONAL LAW, 1.

CROWN.

See CONSTITUTIONAL LAW, 2.

CROWN LANDS.

Free grants — Crown timber — Timber license — Trespass — Patent — Reservation — R. S. O. (1887) ch.

25, secs. 4, 10—*R. S. O. (1887) ch. 28.*]—The plaintiff was in March, 1884, located as the purchaser of a lot in the township of Burleigh and obtained a patent therefor in November, 1888, the patent being in the usual form of a patent in fee to a purchaser, without any reservation of timber or any reference to the "Free Grants and Homesteads Act." The defendants, assuming to act under a timber license issued in May, 1888, covering this and other lots, entered upon the lot after the issue of the patent and took timber therefrom. In the license the lot was referred to as "located and sold." The township of Burleigh was within the geographical limits described in section 4 of the Free Grants and Homesteads Act, R. S. O. (1887) ch. 25, but had never been appropriated or set apart as Free Grant lands under the provisions of that Act:—

Held, that the lot was not "land located or sold within the limits of the Free Grant Territory," within the meaning of that Act, and that the patent was not subject to the reservations as to timber in that Act contained.

The expression "Free Grant Territory" in section 10 does not refer to the whole territory or tract defined in section 4, but only to such portion of that territory or tract as may be actually set apart and appropriated by the Lieutenant-Governor in Council under the Act.

Held, further, that there being no actual reservation in the patent the defendants had no right to cut the timber after its issue and were liable in damages.

Judgment of MACMAHON, J., affirmed. *Shairp v. Lakefield Lumber Co.*, 322.

CROWN PATENT.*See* PATENT.**CROWN TIMBER.***See* CROWN LANDS.**DAMAGES.**

Measure of—Contract for supply of labourers.] — The defendant, who was a contractor for certain work in this Province, entered into an agreement with the plaintiffs that if they would go to New York, at their own expense, and procure about 200 labourers, he would give them work at \$1.25 a day.

The plaintiffs brought the labourers but the defendant refused to employ them.

The plaintiffs were allowed as damages for the breach of the agreement, \$25 their expenses in going to and returning from New York, and \$700 the amount of advances made by them in paying the fares of certain of the labourers from New York. They were not allowed commission that would have been received by them from the men if employment had been furnished.

Judgment of the Queen's Bench Division affirmed. *Mandia v. McMahon*, 34.

See Grant v. The Peoples Loan and Deposit Company, 85—RAILWAYS, 1.

DEBTOR AND CREDITOR.

See Mendelssohn Piano Company v. Graham and West, 378—ASSIGNMENTS AND PREFERENCES, 3.

DEFAULT.*See* MORTGAGE.**DESCRIPTION OF CHATTELS.**

See BILLS OF SALE AND CHATTEL MORTGAGES.

DESCRIPTION OF LAND.*See* PATENT.**DISMISSAL.***See* MASTER AND SERVANT.**DISSOLUTION.***See* PARTNERSHIP.**DISTRESS.***See* JUSTICE OF THE PEACE.**ELECTORS.***See* INTOXICATING LIQUORS.**EQUITABLE ASSIGNMENT.***See* ASSIGNMENT.**EVIDENCE.**

See BARRISTER AND SOLICITOR — CONTRACT, 1—FRAUDULENT CONVEYANCE—PATENT.

EXECUTORS.*See* TRUSTS AND TRUSTEES, 1.**FINE.***See* JUSTICE OF THE PEACE.

FOLLOWING TRUST MONEYS.

See TRUST AND TRUSTEES, 2.

FORFEITURE.

See MASTER AND SERVANT.]

FREE GRANTS.

See CROWN LANDS.

FRAUD.

See Temperance Colonization Society v. *Fairfield*, 205.

FRAUDS, STATUTE OF.

See Temperance Colonization Society v. *Fairfield*, 205.

FRAUDULENT CONVEYANCE.

1. *Intent to defeat creditors—Secret Trust—Evidence—Pleading*—If a defendant wishes to set up in answer to an action to declare him a trustee of land the defence that the land was conveyed to him for a fraudulent purpose he must in his pleading specifically say so, and admit his own criminality in joining in a criminal act.

If the plaintiff can make out his case without disclosing the alleged fraud, the defendant will not be allowed to show, as a reason why the plaintiff should not recover, the fraud in which the defendant himself participated.

Judgment of FERGUSON, J., reversed. *Day v. Day*, 157.

2. *Intent to defeat creditor.*—A conveyance made by a debtor, in good faith, of his assets to pay his existing debts, cannot be impeached by one who at the time has a right of action against him for a tort and subsequently recovers judgment, even though the conveyance is made because of the threatened action.

Judgment of ROSE, J., 18 O. R. 520, reversed. *Cameron v. Cusack*, 489.

FRAUDULENT PREFERENCE.

See ASSIGNMENTS AND PREFERENCES.

HIGHWAYS.

See MUNICIPAL CORPORATIONS, 1.

ILLEGALITY.

See CONTRACT, 2.

IMPRISONMENT.

See JUSTICE OF THE PEACE.

INTENT.

See ASSIGNMENTS AND PREFERENCES—FRAUDULENT CONVEYANCE.

INTEREST.

See Grant v. *The Peoples Loan and Deposit Company*, 85—SALE OF LAND.

INTOXICATING LIQUORS.

Liquor License Act, R. S. O. ch. 194, sec. 42—By-law—Electors—

The electors entitled to vote upon a by-law under the Liquor License Act, R. S. O. ch. 194, sec. 42, to increase the amount payable for license duty, are those entitled to vote at municipal elections.

Judgment of ROSE, J., 17 O. R. 522, affirmed on other grounds. *In re Croft and The Town of Peterborough*, 21.

See *Thornley v. Reilly*, 204.

JOINT TRAFFIC AGREEMENT.

See *Owen Sound Steamship Co. v. Canadian Pacific Railway Co. et. al.* 482.

JUSTICE OF THE PEACE.

Summary conviction — Fine — Distress — Part payment — Imprisonment — Notice of action — R. S. C. ch. 178, secs. 60, 61, 62, 63, 64, 65, 66, 67 — R. S. O. (1887) ch. 73, sec. 14. — A commitment for part of the sum adjudged by the conviction to be paid is not authorized by the Summary Convictions Act, and is illegal.

The plaintiff was convicted under the Canada Temperance Act, and was adjudged to pay a fine and costs, to be levied by distress if not paid forthwith, and in default of sufficient distress to be imprisoned, &c. He paid the costs but not the fine, and a distress warrant was issued against him. Nothing being made under the distress a warrant of commitment was issued under which he was imprisoned:—

Held, that the commitment was bad.

Trigerson v. Board of Police of

Cobourg, 6 O. S. 405, approved and followed.

Held, however, that the magistrate having, in the honest belief that he was acting in the execution of his duty as such, issued the warrant of commitment after payment of the costs adjudged, was, though acting without jurisdiction, entitled to notice of action, and that, no notice having been given, the action failed.

Judgment of the Common Pleas Division, 17 O. R. 706, affirmed on other grounds. *Sinden v. Brown*, 173.

KNOWLEDGE OF INSOLVENCY.

See ASSIGNMENTS AND PREFERENCES.

LACHES.

See TRUSTS AND TRUSTEES, 1.

LANDLORD AND TENANT.

See *Magee v. Gilmour*, 27.

LAW SOCIETY.

Benchers — “Retired Judge” — R. S. O. (1877) ch. 138, sec. 4 — R. S. O. (1887) ch. 145, sec. 4 — A Judge of a Superior Court of the Province of Ontario, who, after his voluntary resignation of his office, before he has become entitled to a retiring allowance, has been accepted, resumes the practice of his profession, is a “retired judge” within the meaning of R. S. O. (1877) ch. 138, sec. 4, and as such is an *ex officio* Benchers of the Law Society of Upper Canada.

Judgment of the Chancery Division, 17 O.R. 104, affirmed, BURTON, J. A., dissenting. *Macdonell v. Blake*, 312.

See BARRISTER AND SOLICITOR.

LEASE.

See LANDLORD AND TENANT.

LICENSE.

See *Thornley v. Reilly*, 204 — CROWN LANDS — INTOXICATING LIQUORS—RAILWAYS, 1.

LIFE INSURANCE.

Benevolent society — R. S. O. (1877) ch. 167—47 Vic. ch. 20, (O).]—The “Act to secure to Wives and Children the Benefit of Life Insurance,” 47 Vic. ch. 20 (O.), applies to insurances in societies incorporated under the Benevolent Societies Act, R. S. O. (1877) ch. 167.

Re O'Heron, 11 P. R. 422, overruled.

Judgment of PROUDFOOT, J., reversed, BURTON, J. A., dissenting. *Swift v. The Provincial Provident Institution*, 66.

LIMITATION OF ACTION.

See *Anderson v. Canadian Pacific Railway Co.*, 480—MUNICIPAL CORPORATIONS 1.—RAILWAYS 1.—STATUTE OF LIMITATIONS.

LIQUOR.

See INTOXICATING LIQUORS.

LOAN.

See *Mendelssohn Piano Company v. Graham and West*, 378.

LOCAL IMPROVEMENT RATES.

See COVENANTS FOR TITLE.

MASTER AND SERVANT.

Wrongful dismissal—Right to dismiss—Grounds of dismissal—Exercise of right—Forfeiture of property.—The plaintiff, who was the inventor of a certain machine and had assigned certain patents therefor to the defendants, agreed to obtain patents for certain improvements made by him thereon, and to assign them to the defendant as soon as obtained, who in consideration thereof agreed to employ the plaintiff for two years from the date of the agreement for the purpose of demonstrating and placing the patents on the market, and to pay him a certain sum for salary and also his expenses, and the plaintiff and defendant were to share the profits in certain proportions.

The tenth clause of the agreement was as follows:—“It is further agreed that the party of the first part (the defendant) is to be the absolute judge as to the manner in which the party of the second part (the plaintiff) performs his duties under this agreement and shall have the right at any time to dismiss him for incapacity or breach of duty, in which event the party of the second part shall only be entitled to be paid his salary up to the time of such dismissal, and shall have no claim whatever against the party of the first part.”

The defendant dismissed the plaintiff within three months of the date of agreement for alleged disobedience and incapacity, without communicating to the plaintiff his reasons for so acting or calling upon him for any explanations:—

Held, [Hagarty, C. J. O., dissenting] that the plaintiff having certain rights of property under the agreement the parties did not occupy merely the relation of master and servant, and that under the tenth clause the defendant occupied a quasi judicial position and had no right arbitrarily to dismiss the plaintiff but was bound to act in good faith and to enquire into the circumstances upon which he based his determination to dismiss, this necessarily involving notice to the plaintiff and an opportunity of being heard.

Russell v. Russell, 14 Ch. D. 471, distinguished.

Judgment of the Queen's Bench Division, 16 O. R. 495, affirmed.

Marshall v. McRae, 139.

See CONTRACT, 1—NEGLIGENCE—RAILWAYS, 2.

MEASURE OF DAMAGES.

See DAMAGES.

MORTGAGE.

Shares—Sale—Wilful neglect or default.]—The defendant, who was mortgagee of certain shares in a company, sold them by auction. The plaintiff, who was entitled to the shares subject to the defendant's claim, knew of and ratified the sale. The purchaser refused upon various grounds to carry out the sale, and

no attempt was made by the defendant to compel completion of the contract. Subsequently the shares fell very much in value:—

Held, [BURTON, J. A., dissenting], that there was no duty cast upon the defendant to take proceedings against the purchaser to compel completion, and that he was not liable to account for the shares at the price that would have been realized had the sale been completed. The plaintiff could have paid the defendant's claim and then have herself taken proceedings against the purchaser, and not having done so, was not entitled to complain.

Judgment of ROSE, J., affirmed. *Daniels v. Noxon*, 206.

See Grant v. The People's Loan and Deposit Company, 85—ASSIGNMENTS AND PREFERENCES—BILLS OF SALE AND CHATTEL MORTGAGES.

MUNICIPAL CORPORATIONS.

1. *Highways—Bridges—Limitation of action*—R. S. O. ch. 184, secs. 530, 531.]—An action to recover damages sustained by reason of the neglect of a municipal corporation to keep in repair the approaches to a bridge, where the bridge and approaches are under the jurisdiction of one municipality only, must be brought within three months after the damages have been sustained.

Section 530 of R. S. O. ch. 184, applies only to cases where one municipality has jurisdiction over a bridge and another has jurisdiction over the adjacent approaches.

Judgment of ARMOUR, C. J., affirmed. *Johnston v. Township of Nelson*, 16.

2. *Extending sewer through contiguous municipality*—"Territory"—*R. S. O. (1887) ch. 184, sec. 492, sub-sec. 2.*—The "territory" of the municipality referred to in *R. S. O. (1887), ch. 184, sec. 492, sub-s. 2*, is the land comprised within the bounds, and under the jurisdiction of, the municipality, and is not limited to lands that are the property of the municipality.

One municipality cannot therefore extend a sewer through lands within the bounds of a contiguous municipality, without the consent of the latter, or without taking the statutory steps, even although the lands through which the sewer is to run have been purchased by the former municipality from the private owners.

Judgment of the Chancery Division, 18 O. R. 199, affirmed, *BURTON, J.A.*, dissenting. *Township of Barton v. City of Hamilton*, 346.

NEGLECT.

See MORTGAGE.

NEGLECT.

Master and servant—Accident caused by defect in hoist.—The defendants were the owners of a tannery for use in which a hoist had been built for them by a contractor, and one of them was, with the plaintiff, one of the defendants' servants, aiding the contractor in putting the hoist in place and in testing it. Owing to a defect in the mechanism, of which the plaintiff and defendants were ignorant, the hoist fell and the plaintiff was severely injured. Both parties were aware that no safety catches had been put in the hoist.

The presence of these might have stopped the fall but their absence had nothing to do with the occurrence of the accident.

Held, that the defendants were not liable.

Judgment of the Queen's Bench Division directing a new trial set aside, and judgment of *FALCONBRIDGE, J.*, at the trial restored. *Ross v. Cross & Co.*, 29.

See Doan v. Michigan Central R. W. Co., 481—RAILWAYS, 2.

NOTICE.

See Magee v. Gilmour, 27 — *Thornley v. Reilly*, 204—ASSIGNMENTS AND PREFERENCES—BARRISTER AND SOLICITOR — JUSTICE OF THE PEACE.

NOVATION.

See PARTNERSHIP.

OATH.

See BARRISTER AND SOLICITOR.

OVERHOLDING TENANT.

See Magee v. Gilmour, 27.

PARENT AND CHILD.

See CONTRACT, 1.

PARTNERSHIP.

Dissolution—New firm—Novation—Trust—Right of third person to

enforce.—A firm composed of two members dissolved partnership. One of the partners continued the business, giving to the retiring partner a number of notes in payment of his share in the business. The continuing partner afterwards formed a partnership with another person and, by the articles thereof, transferred to the new firm, as his contribution to the capital, all the assets of his business subject to the deduction therefrom of his liabilities, which they were sufficient to pay in full, and which were to be assumed by the co-partnership and charged against him. Among these liabilities, known to the new partner, were a number of the notes which the retiring partner had endorsed to the plaintiff before maturity. The new firm paid two of these notes and interest on another, and had some negotiations with the plaintiff for an extension of time for payment of the unpaid notes.

Per HAGARTY, C.J.O., OSLER, and MACLENNAN, J.J.A., differing on this point from the judgment of the Queen's Bench Division, 14 O. R. 137, that no trust was established in favour of the retiring partner by the articles of partnership of the new firm, and that the plaintiff was not entitled to enforce against the new firm the performance of the stipulation in the articles for payment of the notes held by her.

Per BURTON, J.A. There was a trust and the judgment should be affirmed on that ground.

Per HAGARTY, C.J.O. The judgment should be affirmed on the ground that the evidence established an independent agreement between the new firm and the plaintiff to pay the notes in question.

Per BURTON, OSLER, and MACLENNAN, J.J.A. 71—VOL. XVII. A.R.

NAN, J.J.A. No such agreement was proved.

Gregory v. Williams, 3 Mer. 582, and *In re Empress Engineering Co.*, 16 Ch. D. 125, specially considered.

The Court being thus evenly divided as to the result, the appeal was dismissed, with costs. *Henderson v. Killey et al*, 456.

See Mendelssohn Piano Company v. Graham and West, 378.

PAYMENT.

See JUSTICE OF THE PEACE.

PLEADING.

See Doan v. Michigan Central Railway Co., 481—FRAUDULENT CONVEYANCE, 1.

PATENT.

Reservation—Evidence.—The description of lands conveyed by a Crown Patent was “all that parcel of land containing by admeasurement sixty acres, be the same more or less, being composed of lot number nine, exclusive of the lands covered by the water of the S. River.”

Lot nine included, by metes and bounds, two hundred acres, but the S. River ran through it. At the time of and for some time previous to, the issue of the patent the waters of the S. River at this place were penned back by a dam.

Held, that the words “the waters of the S. River” did not mean the waters of that river flowing in its natural channel merely, or the waters at the height at which they might happen to be on the day of

the issue of the patent, but had the effect of reserving from the grant that portion of the lot liable to be covered, owing to the existence of the dam, by the waters of the river, at their natural height at any time during the ordinary changes of the seasons.

Held also, that extrinsic evidence was admissible for the purpose of explaining the language of this description, and that, upon that evidence, the land in question had not passed under the grant.

Judgment of the Queen's Bench Division, 16 O. R. 49, reversed. *Brady v. Sadler*, 365.

See CROWN LANDS.

PRACTICE.

See CONSTITUTIONAL LAW, 1.

PROFITS.

See Mendelssohn Piano Company v. Graham and West, 378.

PROPERTY AND CIVIL RIGHTS.

See CONSTITUTIONAL LAW, 2.

PUBLIC POLICY.

See CONTRACT, 2.

PURCHASE BY TRUSTEE.

See TRUSTS AND TRUSTEES, 1.

QUASHING CONVICTION.

See CONSTITUTIONAL LAW, 1.

RAILWAYS.

Constitutional Law—Limitation of Action—R. S. C. ch. 109, sec. 27—Timber Licenses—Intervals between Licenses—Trespass—Continuing Damage—R. S. O. (1887) ch. 28.—The defendants, a railway company incorporated by an Act of the Parliament of Canada and subject to the provisions (among other provisions) of sec. 27 of the Railway Act of Canada, built their road through lands in the Province of Ontario, the fee of which was in the Crown but over which the plaintiffs had for three successive years held timber licenses issued by the Provincial Government. These licenses, giving the right to cut timber and exclusive possession in the usual form, were dated respectfully the 5th July, 1883, the 10th December, 1884, and the 22nd of July, 1885, and each extended from its date to the 30th of the next April. The defendants entered upon the limits in question about the end of the year 1884 and the road was completed in July, 1886. In building the road the defendants cut down timber on the line and also both within and outside the six rod belts mentioned in the statute. No timber was cut after December, 1885. The plaintiffs brought this action on the 9th of September, 1886, to recover damages for the timber cut. It was admitted that as to timber cut outside the six rod belts they were entitled to recover, but it was contended that as to timber cut on the line and within those belts the action was barred. The defendants had filed their plan and book of reference but they had not taken any of the statutory steps to acquire the interest of the plaintiffs.

Held, per HAGARTY, C. J. O., and

OSLER, J. A.—That the damage to the timber on the line and within the six rod belts was damage “sustained by reason of the railway” within the meaning of section 27 of R. S. C. 109, and that that section was *intra vires* the Dominion Parliament. That the plaintiffs were entitled to damages for the illegal occupation of the limits and as consequent thereon to damages for all injury done during the illegal occupation; but that the plaintiffs had no title to the limits sufficient to maintain an action, either on legal or equitable principles, in the intervals between the licenses. That, therefore, the right of action was barred except as to damages sustained during the currency of the last license, but was saved as to those by virtue of the occupation being illegal up to the 30th of April, 1886, less than six months before action.

Per BURTON, J. A., and MACLENNAN, J. A.—That the section was *ultra vires* the Dominion Parliament as being an unnecessary interference with property and civil rights within the Province, but that even if valid would not avail for the protection of the defendants as they were mere trespassers.

Per MACLENNAN, J. A.—That even if the section were valid and applied the plaintiffs were entitled to recover all the damages, the trespass having been a continuous uninterrupted one and the plaintiffs’ right of renewal of their licenses being sufficient to enable them to recover notwithstanding the intervals between them. *McArthur v. The Northern and Pacific Junction R. W. Co. et al.*, 86.

2. *Master and servant—Negligence*—“Any person injured”—51 Vic., ch. 29, sec. 262, sub-sec. 3; sec. 289.

(D.)—A servant of a railway company is a “person” within the meaning of 51 Vic. ch. 29, sec. 289, (D.), and as such is entitled to recover damages if injured by the negligence of his employers in omitting to comply with the provisions of section 262, by packing frogs as therein directed.

Judgment of the Chancery Division, 18 O. R. 314, affirmed. *Le May v. Canadian Pacific R. W. Co.*, 293.

3. *Lands acquired for railway purposes—Statute of Limitations.*]—A title by possession may be acquired as against a railway company to lands originally obtained by them for railway purposes.

Bobbett v. South Eastern R. W. Co., 9 Q. B. D. 424, approved.

Judgment of FALCONBRIDGE, J., affirmed. *The Erie and Niagara Railway Company v. Rousseau et al.*, 483.

See Anderson v. Canadian Pacific Railway Co., 480—*Doan v. Michigan Central R. W. Co.*, 481—*Owen Sound Steamship Co. v. Canadian Pacific R. W. Co. et al.*, 482.

REPAYMENT OF CONSIDERATION.

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SALE.*See* MORTGAGE.**SALE OF GOODS.***See* *Anderson v. Fish*, 28.**SALE OF LAND.***Vendor and purchaser—Contract—Time for completion—Interest.*]

Where in a contract for the sale and purchase of land, the parties fix the time for payment of the purchase money and the period from which interest thereon is to be computed, irrespective of the time fixed for completion, interest must, in the absence of default or breach of contract or of actual misconduct in relation thereto on the part of the vendor, be paid from the period named, notwithstanding the existence of difficulties as to title justifying the purchaser in refusing to complete until they are removed.

Judgment of *BOYD, C.*, reversed.

De Visme v. De Visme, 1 Mac. & G. 352, observed upon as being no longer authority. *IN RE DINGMAN AND HALL'S CONTRACT*, 398.

SALE OF LIQUOR.*See* *Thornley v. Reilly*, 204.**SECRET TRUST.***See* FRAUDULENT CONVEYANCE, 1.**SEWER.***See* MUNICIPAL CORPORATIONS, 2.**SHAREHOLDER.***See* COMPANY.**SHARES.***See* COMPANY.—MORTGAGE.**SPECIFIC PERFORMANCE.***See* *Temperance Colonization Society v. Fairfield*, 205.**STATUTES.**B. N. A. Act.]—*See* CONSTITUTIONAL LAW, 1, 2.R. S. O. (1877) ch. 138, sec. 4.]—*See* LAW SOCIETY.R. S. O. (1877) ch. 167.]—*See* LIFE INSURANCE.47 Vic. ch. 20 (O).]—*See* LIFE INSURANCE.R. S. C. ch. 109, sec. 27.]—*See* *Anderson v. Canadian Pacific R. W. Co.*, 480—RAILWAYS, 1.R. S. C. ch. 178, secs. 60, 61, 62, 63, 64, 65, 66, 67.]—*See* JUSTICE OF THE PEACE.R. S. O. (1887) ch. 25, secs. 4, 10.]—*See* CROWN LANDS.R. S. O. (1887) ch. 28.]—*See* CROWN LANDS—RAILWAYS 1.R. S. O. (1887) ch. 73, sec. 14.]—*See* JUSTICE OF THE PEACE.R. S. O. (1887) ch. 124, secs. 2, 3.]—*See* ASSIGNMENTS AND PREFERENCES.R. S. O. (1887) ch. 145, sec. 4.]—*See* LAW SOCIETY.R. S. O. (1887) ch. 145, secs. 36, 44.]—*See* BARRISTER AND SOLICITOR.R. S. O. (1887) ch. 184, sec. 492, subsec. 2.]—*See* MUNICIPAL CORPORATIONS, 2.

R. S. O. (1887) ch. 184, secs. 530, 531.]
See MUNICIPAL CORPORATIONS, 1.

R. S. O. (1887) ch. 193, sec. 7, sub-sec. 1.]—See CONSTITUTIONAL LAW, 2.

R. S. O. (1887) ch. 194, sec. 42.]—See INTOXICATING LIQUORS.

R. S. O. (1887) ch. 194, sec. 125.]—See *Thornley v. Reilly*, 204.

51 Vic. ch. 29, sec. 262, sub-sec. 3, sec. 289 (D).]—See RAILWAYS, 2.

51 Vic. ch. 32 (O).]—See CONSTITUTIONAL LAW, 1.

52 Vic. ch. 15 (O).]—See CONSTITUTIONAL LAW, 1.

STATUTE OF FRAUDS.

See *Temperance Colonization Society v. Fairfield*, 205.

STATUTE OF LIMITATIONS.

Acknowledgment of debt.]—An acknowledgment of a debt, not being a debt by speciality, to be sufficient under the Statute of Limitations, must be made to the creditor or to his agent. A general acknowledgment to a third person is not sufficient.

Judgment of the County Court of Wentworth affirmed. *Goodman v. Boyes*, 528.

See RAILWAYS, 3—TRUSTS AND TRUSTEES, 1.

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See CROWN LANDS—RAILWAYS, 1.

TRUSTS AND TRUSTEES.

1. *Executors*—Acceptance of office—Purchase by trustee of trust property—*Laches*—*Statute of Limitations.*]—The plaintiff and defendant were brothers and their father, who

died in the year 1846, appointed the plaintiff and two other sons of the testator his executors, and among other bequests devised the land in question to the defendant. The testator had endorsed a note for the accommodation of the plaintiff, and after the testator's death the holders of this note sued the plaintiff and the two brothers as executors and recovered judgment against them. The land in question was sold under that judgment at sheriff's sale and was bought in by the plaintiff. The will had been registered but had not been proved. Subsequently the plaintiff mortgaged the land in question and sold it subject to the mortgage. The mortgagees afterwards sold and the plaintiff again bought in the land.

Held, that the plaintiff and his brothers having defended the action on the note as executors, and judgment having been recovered against them as such must be held to have accepted the office; that want of probate was therefore immaterial and that the sheriff's sale was valid.

Held, also, that it being the plaintiff's duty to pay the note, he had not acquired title to the land for his own benefit at the sheriff's sale, but became a trustee for the devisee, the defendant, and that this trust revived when the plaintiff bought in the land for the second time.

Held, further, that assuming that the plaintiff was not a trustee for the defendant and had no paper title there was not, upon the evidence, any possession of the land in question by the plaintiff sufficient to confer a title under the Statute of Limitations.

Held, lastly, that the situation of the parties not having changed the defendant was not bound by laches. Judgment of the Chancery Division

affirmed. *McDonald v. McDonald*, 192.

2. *Breach of trust—Following trust moneys.*]—Three persons occupying a fiduciary position towards a bank, became partners in a firm, agreeing to pay for their interest a certain sum of money in liquidation of creditors' claims. They did pay this sum but out of the moneys of the bank wrongfully appropriated by them. Subsequently the firm was formed into a joint-stock company, and the assets of the partnership were assigned by the partners to the company. The company soon afterwards failed, and a winding-up order was made, the original assets, upon which the bank claimed a lien, to a considerable extent coming into the possession of the liquidator.

Held, that the original partners were not affected with constructive notice of the means by which the incoming partners obtained the moneys brought in, and that no actual notice to them or to the company being shown the bank had no lien.

Judgment of the County Court of York reversed. *In re Herr Piano Company*, 333.

See FRAUDULENT CONVEYANCE, 1.
—PARTNERSHIP.

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See *Owen Sound Steamship Co. v. Canadian Pacific Railway Co. et al*, 482.

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